(16,748.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 211.

C. H. BOSWORTH, RECEIVER OF THE CHICAGO, PEORIA AND ST. LOUIS RAILWAY, PETITIONER,

vs.

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS (INTERVENING PETITIONER).

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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a *Transcript of Record.*

In the United States Circuit Court of Appeals for the Seventh Circuit, October Term, A. D. 1896.

C. H. BOSWORTH, Receiver of the Chicago, Peoria and St. Louis Railway Company, Appellant,
vs.
TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, Intervening Petitioner, Appellee.
} No. 367.

Mr. Bluford Wilson, Mr. Philip Barton Warren, counsel for appellant; Mr. Samuel P. Wheeler, counsel for appellee.

Appeal from the circuit court of the United States for the southern district of Illinois.

Transcript of record filed November 30, 1896.
Printed record filed ——.
Filed Feb. 20, 1897.

OLIVER T. MORTON, *Clerk.*

b In the Circuit Court of the United States for the Southern District of Illinois.

MERCANTILE TRUST COMPANY
against
CHICAGO, PEORIA & ST. LOUIS RAILWAY COMPANY *et al.*
} In Chancery. Consolidated Cause.

In the matter of the intervening petition of the Terminal Railroad Association of St. Louis.

1 *Placita.*

Pleas in the circuit court of the United States of America for the southern district of Illinois, held at the city of Springfield, in said district, before the Hon. William J. Allen, district judge of said district, and in the absence of the Hon. William A. Woods, the Hon. James G. Jenkins, and the Hon. John W. Showalter, judges of the seventh judicial circuit, on Thursday, the thirtieth day of July, at the June term of said court, in the year of our Lord one thousand eight hundred and ninety-six, and of our Independence the one hundred and twenty-first year.

MERCANTILE TRUST COMPANY
vs.
CHICAGO, PEORIA & ST. LOUIS RAILWAY Company *et al.*
} In Chancery. Consolidated Cause.

In the matter of the intervening petition of the Terminal Railroad Association of St. Louis.

Be it remembered that heretofore, to wit, on the twenty-first day of September, in the year of our Lord one thousand eight hundred

and ninety-three came the Mercantile Trust Company, of the State of New York, by Messrs. Alexander and Geen, its solicitors, and filed in the office of the clerk of the circuit court of the United States for the southern district of Illinois, its bill for foreclosure of mortgage and appointment of receivers in case of The Mercantile Trust Company of New York against The Chicago, Peoria and St. Louis Railway Company, which said bill of complaint is as follows, to wit:

2 *Bill of Complaint of Merc. Trust Co.*

Filed Sept. 21, '93.

In the Circuit Court of the United States for the Southern District of Illinois, in the Seventh Circuit. (In Equity.)

To the honorable judges of the circuit court of the United States for the southern district of Illinois for the seventh circuit, sitting in equity:

The Mercantile Trust Company, a corporation created by and existing under the laws of the State of New York, brings this its bill of complaint against the Chicago, Peoria and St. Louis Railway Company, a corporation created and existing under *the* by virtue of the laws of the State of Illinois, as hereinafter set forth.

I. And thereupon your orator complains and says, that the Mercantile Trust Company is a corporation created by and existing under the laws of the State of New York, and having its principal office for the transaction of its business in the city of New York, in the said State of New York and is a citizen of the said State of New York, within the meaning of the laws fixing and determining the jurisdiction of this honorable court.

II. And your orator further shows, upon its information and belief, that on and prior to the first day of March, 1888, there existed a railroad corporation known as the Chicago, Peoria and St. Louis Railway Company, duly created by and existing under and by virtue of the law of the State of Illinois, and possessed of and endowed with powers, rights, privileges, franchises and immunities, granted by the law of said State, and was and is a citizen of the said State of Illinois, within the meaning of the laws fixing and determining the jurisdiction of this honorable court, and was at all times duly authorized by law to construct, lease, purchase and operate a railway beginning in the city of Pekin, in the county of Tazewell, and terminating in the city of Jacksonville, in the county of Morgan, with a branch of railway beginning in the city of Havana, in the county of Mason, and terminating in the city of Springfield, in the county of Sangamon; all in the said State of Illinois.

3 III. And your orator further shows unto your honors, that heretofore and on or about the first day of March, 1888, the said Chicago, Peoria and St. Louis Railway Company, being thereunto duly authorized, by its president and secretary and under its

corporate seal, made and executed its 1,500 bonds, known as first-mortgage five per cent. gold bonds, numbered consecutively from 1 to 1,500 inclusive, each for the sum of $1,000, bearing date on said first day of March, 1888, by the terms of which bonds the said company promised to pay to the bearer of each bond, the sum of $1,000, United States gold coin, in the city of New York, on the first day of March, 1928, and also interest thereon at the rate of five per cent. per annum, payable semi-annually, in like gold coin, in the city of New York, on the presentation and surrender of the coupons annexed to the said bonds as they severally become due, on the first days of March and September; and that annexed to said bonds were coupons in substantially the following form:

The Chicago, Peoria and St. Louis Railway Company will pay to the bearer in the city of New York, twenty-five dollars in United States gold coin, on the first day of ——, being six months' interest on bond number —.

—— ——, *Secretary.*

IV. And your orator further shows unto your honors, that on or about the said first day of March, in the year eighteen hundred and eighty-eight, for the purpose of securing the payment of the said bonds and interest, as the same should become due and payable, the said railway company made and executed a certain mortgage or trust deed, a copy of which mortgage or trust deed is hereto annexed and marked Schedule "A," and forms part of this bill of complaint. That the said mortgage or trust deed, after reciting that the railway company desired to contract a loan for the purpose of constructing, purchasing and equipping its said railway, and that a meeting of the stockholders of said railway company was held on the 20th day of September, 1887, pursuant to law, authorizing the making of the said loan and the execution of said mortgage or trust deed, and whereas, the same was unanimously authorized by the board of directors of said railway company, the said Chicago, Peoria and St. Louis Railway Company, in order to secure the payment of said bonds and all the interest to accrue thereon, in consideration of the premises and of one dollar to the said railway company duly paid by your orator, at or before the ensealing and delivery of the
4 said mortgage or trust deed, the receipt whereof was thereby acknowledged, granted, bargained and sold, conveyed, transferred, assigned and set over unto your orator, and its successors in trust, all and singular the said railway now belonging or which might thereafter belong to the said railway company, and which the said railway company was authorized by law to construct, purchase and operate as follows:

"Beginning in the city of Pekin and terminating in the city of Jacksonville, together with a branch of railway beginning in the city of Havana and terminating in the city of Springfield, all in the State of Illinois, being about one hundred and twenty miles of railway, more or less; and also all rolling stock equipment and machinery, connected or to be connected with said railway, and all franchises now held or hereafter to be acquired by the said party of

the first part, its successors or assigns, in connection therewith, including in the premises hereby granted all the railways, ways and rights of way, and all the depot grounds and other lands, and all the tracks, bridges, viaducts, culverts, fences and other structures, and all the depots, stations, station-houses, engine-houses, car-houses, freight-houses, wood-houses and other buildings, and all machine shops and other shops, held or acquired, and which shall be held or acquired for use upon the aforesaid line of railway, or in connection with the business thereof; and including also all the locomotives, tenders, passenger, baggage and freight and other cars, and all the rolling stock and equipment, and all the machinery, tools, implements, fuel and materials for constructing, operating, repairing or replacing the said railway, or the equipments or appurtenances of the said railway, now held or hereafter to be acquired by the said party of the first part, together with all and singular the tenements, hereditaments and appurtenances of the said railway and premises, or any part thereof belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, tolls, incomes, rents, issues and profits thereof, and also all the estate, right, title, interest, property, possession, claim and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in and to the same, and any and every part and parcel thereof, with the appurtenances, and all books of account and vouchers kept and to be kept by the said party of the first part, which the said party of the first part now holds or shall hereafter acquire, and also twenty-five hundred shares of the capital stock of the Peoria and Pekin Union Railway Company, amounting to two hundred and fifty thousand dollars, par value. To have and to hold the said railway and premises, and all the franchises and property hereinbefore described unto the said party of the second part, and its successors in trust forever. But in trust, nevertheless, for the uses and purposes and with and subject to the powers, agreements and conditions hereinafter in that behalf mentioned and set forth."

It was further agreed in and by the said mortgage or trust deed that the said railway company should make and deliver unto your orator, and your orator should certify or countersign bonds of the said railway company to an amount not exceeding fifteen hundred thousand dollars at par, which bonds should be certified and delivered to the said railway company by your orator.

V. And your orator avers and alleges that said bonds to the amount of fifteen hundred thousand dollars were delivered to and certified by your orator, and have been issued for value and sold by said defendant to various individuals and firms, who are too numerous to be made parties to this bill of complaint.

VI. It was further agreed in and by said mortgage or trust deed that until default should be made by the railway company, or its successors or assigns, in the payment of the principal or interest of said bonds, the said railway company should be suffered and permitted to remain in the actual possession of the said railway and premises. It was further covenanted and agreed that the said railway company should keep said property so mortgaged, free from all

liens which might in any way become a prior lien to said mortgage or trust deed, or impair the liens of your orator.

VII. It was further agreed that your orator should have reasonable compensation for any services which it might thereafter render in the trust thereby created, to be paid by the said railway company; and your orator prays to refer to said mortgage or trust deed, which is hereto annexed and made part of this bill of complaint, for the other terms of said mortgage or trust deed.

VIII. And your orator further shows unto your honors, that on the first day of September, 1893, there became due and payable, and accruing upon the bonds secured by said mortgage or deed of trust, and then actually outstanding, the semi-annual installment of interest, evidenced by the coupons attached to said bonds, amounting to the sum of $37,500; that default was made in the payment of the interest on the said bonds, and said installment and interest accruing on said bonds as aforesaid; that the
6 said railway company wholly failed, omitted and refused to pay the said installment of interest, and to pay the interest mentioned and provided for in the said coupons due on said last-mentioned day, or upon any of them, but thereon wholly made default; that said coupons were on that day actually presented for payment at the place where the same were and are payable, to wit, in the city of New York, and payment thereof was demanded and refused, and such default and failure to pay still continues.

IX. Your orator further shows unto your honors, that the holders of a large amount in value of said general consolidated mortgage bonds now actually outstanding, have in writing requested your orator to enforce the remedies provided in said mortgage or trust deed.

X. And your orator further shows unto your honors, that it is informed and believes that the said railway company is insolvent and unable to pay its floating debt and current, and presently accruing indebtedness.

XI. Your orator further shows, that the said mortgaged property is insufficient and inadequate security for the payment of the outstanding bonds secured by the said mortgage; that there is danger that the said property may be sold under judgments, and that the property and lines of said company may be separated and broken up, and the earning capacity destroyed or impaired by the contests of creditors for conflicting claims, and the mortgaged premises wasted and depleted.

XII. Your orator further shows unto your honors, that no proceedings at law have been had, nor any suit or action commenced by or on behalf of your orators or any holder of any of the bonds of the company secured by the mortgage aforesaid, for any interest unpaid or accrued thereon, except only this action.

In consideration whereof, and forasmuch as your orator is remediless in the premises, at and by the strict rules of the common law, and *are* only relievable in a court of equity, where matters of this kind are properly cognizable and relievable.

Your orator, therefore, prays the aid of this honorable court, and

that the said mortgage or deed of trust may be decreed to be a lien upon all the property mentioned and described therein, and upon all the property, real, personal or mixed, rights, franchises,
7 lands, titles, railroads, branches, extensions, tolls, incomes, rents and issues of the said railway company, described in the said mortgage or trust deed, within the jurisdiction of this honorable court, and that the said railway company may be decreed to pay unto your orator and the other bondholders under aforesaid mortgage or deed of trust all arrears of interest now due, or that may hereafter become due and payable upon said bonds, together with all the costs and expenses in this behalf incurred and expended. And, in default thereof, that the said defendant above named, and all persons claiming under it, may be forever barred and foreclosed of and from all equity of redemption and claim of, in and to the said mortgaged premises, and every part and parcel thereof, and that all and singular the said mortgage premises, within the jurisdiction of this honorable court, with the appurtenances, property and effects, rights, immunities and franchises in the said mortgage mentioned, may be sold under a decree of this honorable court, and that out of the money arising from the sale thereof, after deducting from the proceeds of any such sale just allowances for all disbursements and expenses of the said sale, including attorneys' and counsel fees, and the reasonable charges of your orator for services rendered as trustee and for all expenses incurred by it in the premises, and all payment which may be made for taxes or assessments on the said premises, or any part thereof, to apply the said proceeds to the payment of the principal of such of the aforesaid bonds as may be at that time unpaid, whether or not the same shall previously have become due, and of the interest which shall at that time have accrued on the said principal and be unpaid, without discrimination or preference, ratably to the aggregate amount of such unpaid principal and accrued and unpaid interest.

And your orator further prays, that an account may be taken of the bonds secured by the said mortgage, and of the amount due on said bonds for principal and interest, or either; and the names of the lawful holders thereof may be ascertained.

And your orator further prays, that a receiver may be appointed according to the course and practice of this court, with the usual powers of receivers in like cases of all the property, equitable interests, things in action, effects, money, receipts and earnings, rights, privileges, franchises and immunities of the said railway company, and its tolls, incomes, rents and issues and of all other property included in and covered by the said mortgage within the jurisdiction of this honorable court, and that the defendants be decreed
8 to make such transfer or conveyances to such receiver, and to the purchasers of said property at any sale as aforesaid, as may be necessary and proper to put them or either of them in possession and control of said property.

And your orator further prays, that a writ of injunction issuing out of and under the seal of this honorable court, or issued by one

ur honors, according to the form of the statute in such case
e and provided, directing, commanding, enjoining and restrain-
he said defendants, and each and every one of them, from in-
ring with, transferring, selling and disposing of any of the
erty mentioned in and covered by the said mortgage, or from
ng possession of, levying upon or attempting to sell, either by
ial process or otherwise, any portion of the property embraced
covered by said mortgage; and that your orator may have
further or other relief in the premises, as the nature of the cir-
stances of this case may require, and to this honorable court
seem meet.

nd may it please your honors to grant unto your orator a writ
junction, issuing out of and under the seal of this honorable
t, or issued by one of your honors, according to the form of the
te in such case made and provided, directing, commanding,
ining and restraining the said defendants, and each and every
of them, from interfering with, transferring, selling or dispos-
of any of the property mentioned in or covered by the
mortgage, or from taking possession of, levying upon or at-
pting to sell, either by judicial process or otherwise, any portion
e property embraced in or covered by the said mortgage. And
it please your honors to grant unto your orator a subpœna of
United States of America issuing out of and under the seal of
honorable court, directed to The Chicago, Peoria and St. Louis
way Company, the defendant, therein and thereby command-
it, on a day certain therein to be named and under a certain
lty, to be and appear before this honorable court, then and
e to answer (but not under oath) all and singular the premises,
to stand to, perform and abide by the said order, direction and
ee as may be made against it in the premises as shall seem meet
and agreeable to equity and good conscience.

And your orator, as in duty bound, will ever pray, etc.

THE MERCANTILE TRUST COMPANY,

[SEAL.] By EDW. L. MONTGOMERY, *V. P.*

ALEXANDER & GREEN,
Solicitors for Complainant.

HARLES B. ALEXANDER,
ILLIAM D. GUTHRIE,
Of Counsel.

TED STATES OF AMERICA,
Southern District of New York, } ss:

dward L. Montgomery, being duly sworn, says: that he is the
president of The Mercantile Trust Company, the complainant
he foregoing bill of complaint; that he has read the foregoing
of complaint and knows the contents thereof; that the allega-
s therein contained, as far as they relate to his own acts, are
and as far as they relate to the acts of others he believes them
e true.

That in regard to all matters and things in the foregoing bill of complaint alleged which are not within the personal knowledge of this deponent, the deponent has been fully informed and he believes that the same are true.

EDW. L. MONTGOMERY. [SEAL.]

Sworn to before me, this 19th day of September, 1893.

[SEAL.] JOSEPH M. DEUEL,
U. S. Commissioner for the Southern Dist. of N. Y.

10 EXHIBIT A.

Mortgage.

EXHIBIT "A" TO BILL OF COMPLAINT.

Mortgage. Filed Sept. 21, '93.

This indenture, made the first day of March, in the year of our Lord one thousand eight hundred and eighty-eight, between the Chicago, Peoria and St. Louis Railway Company, a corporation of the State of Illinois, of the first part, and the Mercantile Trust Company, of New York City, trustee, of the second part, witnesseth, that,

Whereas, the said party of the first part is duly authorized by law to construct, lease, purchase and operate a railway beginning in the city of Pekin, in the county of Tazewell, and terminating in the city of Jacksonville, in the county of Morgan, with a branch railway beginning in the city of Havana, in the county of Mason, and terminating in the city of Springfield, in the county of Sangamon, all in the State of Illinois.

And whereas, the said party of the first part desires to contract a loan for the purpose of constructing, purchasing and equipping its said railway.

And whereas, at a meeting of the stockholders of said railway company, held on the 20th day of September, A. D. 1887, pursuant to law, resolutions were passed by a vote of more than three-fourths of the outstanding stock of said company, whereby the board of directors was authorized, for the purpose of constructing, purchasing, and equipping its railway to contract for a loan and to secure the payment of the same by mortgage of its corporate property and franchises acquired and to be acquired.

And whereas, at a meeting subsequently held, a quorum being present, the board of directors of said company, by resolution unanimously adopted, authorized the president of said company to negotiate a loan as proposed by said stockholders, as aforesaid.

And whereas, in pursuance of the power and authority duly vested in it, the said party of the first part, in order to defray its obligations in connection with the construction, purchase and equipment of said railway, is about to issue a series of bonds, the aggregate

amount whereof to be at any time outstanding is limited
11 to fifteen hundred thousand dollars in said bonds, at par;
which said bonds shall be of like tenor and date, and for one thousand dollars each, and be payable in forty years from date, in gold coin of the United States of America, at the city of New York, and bear interest at the rate of five per cent. per annum, payable semi-annually, in the like gold coin, at the said city of New York, which payment of interest shall, in all cases, be made without deduction for State or United States taxes.

And whereas, the said bonds are, or are to be, all of like tenor and date, and in substantially the following form:

No. —. $1,000.

"*The Chicago, Peoria and St. Louis Railway Company*" *First-mortgage Five per Cent. Gold Bond.*

The Chicago, Peoria and St. Louis Railway Company, for value received, hereby acknowledges itself indebted to the bearer in the sum of one thousand dollars in United States gold coin, which indebtedness it promises to pay on the first day of March, A. D. 1928, in the city of New York, with interest thereon from the first day of March, A. D. 1888, at the rate of five per cent. per annum, payable semi-annually in the city of New York, on the presentation and surrender of the annexed coupons as they severally become due. If the obligor, or its successors, shall make default in the payment of the semi-annual interest on this bond for six months from the day it becomes due, then without demand or notice, the whole principal thereof shall become due and payable, and may at once be enforced against this company or its successors.

This bond is one of a series of similar bonds issued, and to be issued from time — time by said railway company, the aggregate amount whereof to be at any time outstanding is limited to fifteen hundred thousand dollars in said bonds, at par; and the payment of this bond, in common with the other bonds of said series, is secured by a deed of trust, or mortgage, bearing even date herewith, and conveying to the Mercantile Trust Company of New York City, trustee, all and singular the Chicago, Peoria & St. Louis railway, beginning in the city of Pekin and terminating in the city of
Jacksonville, with a branch railway beginning in the city of
12 Havana and terminating in the city of Springfield, all in the
State of Illinois, together with the equipment and appurtenances of the said railway, and all rights, privileges and franchises thereunto appertaining.

This bond shall not be valid or obligatory until the certificate authenticating the same, which is endorsed hereon, shall have been duly signed by the said trustee.

In witness whereof, the said railway company has caused its corporate seal to be hereunto affixed and the same to be attested by the signatures of the president and secretary, and has likewise caused the signature of the secretary to be affixed to the several coupons

hereunto annexed, at the city of Jacksonville, in the State of Illinois, this first day of March, A. D. 1888.

"THE CHICAGO, PEORIA AND ST. LOUIS
[SEAL.] RAILWAY COMPANY,
By —— ——, *President.*
—— ——, *Secretary.*"

STATE OF ILLINOIS, }
United States of America. }

"*Trustee's Certificate.*"

The Mercantile Trust Company of New York City hereby certifies that this bond is one of a series of bonds issued under the within-mentioned mortgage, or deed of trust.

THE MERCANTILE TRUST COMPANY, *Trustee,*
By —— ——, *President.*

And whereas, each of the said bonds has coupons thereto annexed, representing the several installments of interest to become due thereon, and said coupons bear the engraved signature of the secretary of said company, and are in substantially the following form:

(*Form of Coupon.*)

The Chicago, Peoria and St. Louis Railway Company will pay to the bearer in the city of New York, twenty-five dollars in
13 United States gold coin on the first day of —— 1— being six months' interest on bond, No. —.

—— ——, *Secretary.*

And whereas, it is the true intent and meaning of these presents that each and all of the said bonds, whether now executed or hereafter to be executed, shall be equally secured to be paid by these presents.

Now, therefore, this indenture witnesseth, that the said party of the first part, in order the better to secure the payment of said bonds and all of the interest to accrue thereon, and for and in consideration of the premises, and of the sum of one dollar to the party of the first part, duly paid by the said part- of the second part, at or before the ensealing and deliver- of these presents, the receipt whereof is hereby acknowedged, hath granted, bargained and sold, and by these presents doth grant, bargain, sell, convey, transfer, assign and set over unto the said party of the second part and its successors in trust, all and singular the said railway now belonging, and which may hereafter belong, to the said first party of the first part, and which the said first party of the first part is by law authorized to construct, purchase and operate, beginning in the city of Pekin and terminating in the city of Jacksonville, together with a branch railway beginning in the city of Havana and terminating in the city of Springfield, all in the State of Illinois, being about one hundred and twenty miles of railway, more or less; and also

all rolling stock, equipment and machinery connected or to be connected with said railway, and all franchises now held or hereafter to be acquired by the said party of the first part, its successors or assigns, in connection therewith, including in the premises hereby granted all the railways, ways, and rights of way, and all the depot grounds and other lands, and all the tracks, bridges, viaducts, culverts, fences and other structures, and all the depots, stations, station-houses, engine houses, car-houses, freight-houses, wood-houses and other buildings and all machine shops and other shops, held or acquired, and which shall be held and acquired, for use upon the aforesaid line of railway, or in connection with the business thereof; and including also all the locomotives, tenders, passenger, baggage, freight and other cars, and all the rolling stock and equipment, and all the machinery, tools, implements, fuel and materials for constructing, operating, repairing or replacing the said railway, or the equipments or appurtenances of the said railway, now held
14 or hereafter to be acquired, by the said party of the first part, together with all and singular the tenements, hereditaments and appurtenances to the said railway and premises, or any part thereof belonging, or in anywise appertaining, and the reversion and reversions, remainder and remainders, tolls, rents, incomes, issues and profits thereof, and also all the estate, right, title, interest, property possession, claim and demand whatsoever, as well in law as in equity, of the said party of the first part, of, in and to the same, and any and every part and parcel thereof, with the appurtenances and all books of account and vouchers kept and to be kept by the said party of the first part, which the said party of the first part now holds or shall hereafter acquire, and also twenty-five hundred shares of the capital stock of the Peoria and Pekin Union Railway Company, amounting to two hundred and fifty thousand dollars, par value. To have and to hold the said railway and premises, and all the franchises and property hereinbefore described unto the said party of the second part, and its successors, in trust forever. But in trust, nevertheless, for the uses and purposes and with and subject to the powers, agreements and conditions hereinafter in that behalf mentioned and set forth.

And this indenture further witnesseth, that for the consideration aforesaid, and in order the better and more effectually to secure the payment of said bonds, and of all interest to accrue thereon the said party of the first part has covenanted, promised, granted and agreed to and with the said party of the second part and its successors, as follows, to wit:

Article first. The party of the first part shall make, execute and deliver unto the said party of the second part, and the said party of the second part shall certify or countersign bonds of the party of the first part intended to be secured hereby to an amount not exceeding fifteen hundred thousand dollars ($1,500,000) at par, which bonds shall be certified and delivered to the party of the first part by the party of the second part.

Article second. Until default shall be made by the said party of the first part, its successors or assigns, in the payment of interest or

principal of said bonds, or in the due observance of the covenants and agreements hereinafter contained on the part and behalf of the said party of the first part, the said party of the first part, its successors and assigns, shall be suffered and permitted to remain in the actual possession of said railway and premises, and to exercise the franchises and rights relating thereto, and to collect, receive and use revenues and profits thereof in any manner which will not impair the lien created by these presents.

And the said party of the first part hereby covenants, promises and agrees to and with the said party of the second part and its successors, that the said party of the first part, its successors and assigns, remaining in the possession of the said railway and premises, shall and will keep the said railway in good order and safe running condition, and shall and will from time to time pay and discharge all taxes, assessments and governmental charges, which may be lawfully imposed upon the said railway and premises, or upon any part thereof, and the lien of which might or could be held to be prior to the lien of these presents, so that the priority of these presents may be duly preserved, and that the said party of the first part will not do or suffer any act or thing whatsoever, whereby the lien hereof may or can be impaired, until the said bonds and all interest thereon shall be fully paid and satisfied.

Article third. In case default shall be made in the payment of any semi-annual installment of interest which may accrue upon the said bonds, or upon any of them, when such interest shall become due and be demanded, and such interest, or any part thereof, shall remain unpaid and in arrears for the period of six months, or in case default shall be made in the due observance and performance of the covenant of further assurance hereinafter set forth, or in the payment of any taxes, assessments or other governmental charges, which may be lawfully levied or imposed upon the said railway and premises or upon any part thereof, and either of said last-mentioned defaults shall continue for the period of six months, or in case default shall be made in the payment of the principal of said bonds, or of any one of them, then, and in any and every such case of default, it shall be lawful for the said party of the second part as the trustee, under these presents, or for any successors of the said party of the second part in the trust created by these presents, to enter into and upon the railway and premises hereinbefore granted or conveyed, and each and every part of the same, and from thenceforth the said railway and premises and each and every part thereof, and all and singular the rights and franchises hereinbefore granted, to have, hold and enjoy, operating the said railway by such superintendents, managers, receivers, assistants and servants, or other attorneys or agents as the said trustees shall deem proper, and making from time to time all such repairs and replacements, and all such useful alterations, additions and improvements to the said railway and premises as the said trustee may deem expedient and judicious. And it shall likewise be lawful for the said trustee, after any and every default happening and continuing as aforesaid, to collect and receive all revenues and

profits of the said railway and premises, and of every part and parcel thereof, and after deducting therefrom all the expenses lawfully incurred in making such entry, or in otherwise obtaining possession of said premises, including reasonable attorney and counsel fees, as well as any and all expenses of holding, operating and managing the said railway and premises, and conducting the business thereof, including the costs and expenses of all such repairs, replacements, alterations, additions and improvements, as may be made by said trustee as aforesaid, and all payments which may be made or be due for taxes and assessments, or other charges or liens prior to the liens of these presents upon the said railway and premises, or upon any part or parcel thereof; and just compensation for the trustee's own services, to apply any and all revenues and profits of the said railway and premises which may be received by said trustee as aforesaid, to the payment, first, of all overdue interest on the said bonds with interest thereon, and secondly, to the payment of all interest accruing during such possession of said trustee, which payment of interest shall be made to the holders of the bonds and coupons, evidencing the right to the same, ratably and without discrimination or preference between them.

Article fourth. It is hereby mutually agreed, that any sale of the railway and property hereinbefore conveyed, which may be made for the purpose of enforcing the lien of these presents, the trustee under these presents for the time being, may, in his own discretion, and not otherwise bid for, and if the same be obtainable at the price hereinafter mentioned purchase and acquire the property so offered for sale, in behalf of all the holders of the bonds aforesaid, which shall then be outstanding in proportion to the amount of said bonds, and of the overdue coupons thereunto belonging, by them respectively held.

Provided, however, that nothing herein contained shall authorize the said trustee to bid for the entire property then held upon the trusts of this indenture on behalf of the holders of said bonds, a sum exceeding the whole amount of said bonds then outstanding with the interest accrued thereon, and the expenses of such sales or an amount reasonable proportionate thereto for any part of the said property.

17 And it is hereby further agreed, that the bonds and overdue coupons aforesaid, or any of them shall be received in payment, on account of the purchase-money of any property which shall be offered for sale as aforesaid, as equivalent to so much of the said purchase-money as would be distributable and payable thereon out of the proceeds of such sale.

Article fifth. In case default shall be made in the payment of any semi-annual installment of interest to accrue on any of the said bonds when such interest shall become payable, and if such interest shall remain unpaid and in arrear for the space of six months, then and in each and every such case of the happening and continuing of such default in the payment of interest, the principal of each and all of the said bonds may be declared by the trustee for the time being hereunder, or by a majority in interest of the holders of all

the said bonds which may then be outstanding and unpaid, at the option of such trustee, or of such majority in interest of bondholders, to be and thereupon the same shall become and be due, and payable immediately, notwithstanding that the time limited in said bonds for payment thereof may not then have elapsed.

Article sixth. It is hereby expressly declared and agreed, that in case default shall be made in the payment of interest upon any of the said bonds when such interest shall become due and be demanded, and such default shall continue for the space of six months, or in case default shall be made in the payment of the principal of any of the said bonds when the same shall become due, then, and in either and every such case of default, it shall be the duty of the trustee for the time being, under these presents, to take appropriate proceedings at law or in equity to enforce the rights of the holders of said bonds upon a requisition to that effect being made upon the said trustee, signed by holders of, at least, one-third in amount of the said bonds then outstanding.

Article seventh. The trustee, under these presents, shall have at all times, while the said bonds or any of them remain outstanding, and is hereby granted, full power and authority, to be exercised in the discretion of said trustee and not otherwise, to release from the lien and operation of these presents in such manner as it may be advised upon the request in writing of the said party of the first part, its successors or assigns, any portion of the aforesaid premises,
not being a part of the main line of the said railway which,
18 in the judgment of such trustee, shall not be necessary for
use in connection therewith, and which shall have been acquired for station or depot purposes, or for shops or other buildings, or for supplying fuel, gravel, or other material, but which, in the judgment of such trustee, it shall have become unnecessary or inexpedient to retain in consequence of its having become necessary or desirable to change the location of such depot, shop or other building, or to substitute other lands for the purpose of supplying such fuel, gravel or material; provided, always, that any and all lands and premises which shall be acquired for station or depot purposes, or for shops or other buildings, or for the purpose of supplying fuel, gravel or other material, shall be conveyed to the said trustee to be held by it, upon the trusts of these presents in the same manner as the premises so released. And the said trustee may also allow the said company, its successors or assigns to dispose of any rolling stock, equipment and machinery or other personal property, which may be held for use upon or in connection with said railway, or the business thereof, but which, in said trustee's judgment, shall have become unfit, or undesirable for such use; provided, always, that any and all rolling stock, equipment and machinery or other personal property which may be acquired in substitution for any similar property so disposed of, shall become and be subject to the lien of these presents.

Article eighth. It is hereby expressly declared, and these presents are upon the condition, that if the said party of the first part shall well and truly pay and discharge the interest on each and every of

the said bonds as the same shall mature, and shall well and truly pay and discharge the principal of each and every of the said bonds when such principal shall become due and payable, according to the true intent and meaning of said bonds, and of these presents, and shall well and truly keep and perform the other covenants and agreements in these presents contained, to be by it kept and performed, then these presents, and all the estate and interest thereby granted shall cease, determine and become void, otherwise the same shall be and remain in full force and virtue; and the said party of the first part hereby covenants, promises and agrees to and with the said party of the second part and to and with its successors in trust, that the said party of the first part shall and will well and truly pay the said bonds, and all interest to accrue thereon, at the times and in the manner in said bonds mentioned, and according to the true intent and meaning thereof.

Article ninth. It is hereby declared and agreed that the trustee under these presents shall be entitled to a reasonable 19 compensation for any services which the said trustee may hereafter render in the trust hereby created to be paid by the said party of the first part, that the said trustee shall not be answerable for the default or misconduct or any agent or attorney, who may be appointed by it in pursuance of these presents, if such agent or attorney be selected with reasonable care, and that the said trustee shall not be answerable or accountable for anything whatever in connection with said trust, but gross negligence or willful misconduct or default. And it is further declared and agreed that the trustee hereunder, may at any time be removed by a majority in interest of the *bona fide* holders of said bonds, provided such removal be made by an instrument in writing under seal, duly executed and acknowledged; that the said trustee may resign the trust under these presents at any time by giving sixty days' notice, in writing, of the intention so to do, to the said party of the first part, and to such of the holders of said bonds as shall have registered with such trustee their names and post-office addresses provided such notice of resignation be served on the said party of the first part at its principal office, and on the bondholders who shall have so registered their names and addresses with said trustee, by the deposit thereof in the mail directed to the said bondholders respectively. And it is further agreed and declared, that in case the trustee, hereby appointed, or any successor of such trustee, shall at any time hereafter resign the said trust, or be removed therefrom, as aforesaid, another trustee or trustees may and shall be appointed by a majority in interest of the holders of said bonds, by an instrument in writing duly signed by such majority in interest of such bondholders, or by the vote of a majority in interest of said bondholders, given at a meeting of such bondholders, duly convened and held as hereinafter provided.

And it is further agreed and declared, that in case the appointment of a trustee shall be unduly delayed, and the trust shall remain vacant for more than sixty days, any holder or holders of said bonds to the aggregate amount of one thousand dollars or up-

wards, upon reasonable notice to the said party of the first part, may apply to any court of competent jurisdiction for the appointment of a new trustee, but no bondholder shall be entitled to make such application to court until a reasonable time, to wit: sixty days shall have been allowed for the purpose of enabling a majority in interest of said bondholders to appoint a new trustee as aforesaid.

And it is hereby further agreed, that it shall be the duty of any trustee resigning or being removed as aforesaid, to execute, acknowledge and deliver, not at his own cost or expense, but at the cost and expense of the party of the first part, any and all deeds or instruments which such trustee may be reasonable requested by the said new trustee to execute for the purpose of assuring the title in said premises to such new trustee.

And it is hereby further expressly declared and agreed, that whenever and as often as any contingency shall arise in which the action of a majority in interest of the bondholders of said bonds shall be necessary, or in which the said bondholders are herein declared to have any discretionary voice or power, the trustee hereunder shall be and is hereby authorized and empowered, at the proper cost and expense of the said party of the first part, to call a meeting of all the holders of bonds secured hereby, to be held in the city of New York, by advertisement to be published three times in each week for four weeks in one newspaper of good circulation amongst the business community in that city, and in default of such meeting being called by said trustee within ten days after notification in writing by any bondholder of the necessity therefor it shall be competent for any holder or holders of said bonds to the aggregate amount of one hundred thousand dollars, to call said meeting in the manner aforesaid.

Provided, however, that at any meeting called as aforesaid, a majority in interest of the holders of said bonds may prescribe and establish such rules as they may deem proper for the calling of future similar meetings, and the regulation of the proceedings thereof. And it is hereby declared and agreed, that at any meeting convened and held pursuant to these presents, the holders of said bonds shall be competent to exercise in person, or by proxy, all the powers and authority conferred upon them by these presents.

Provided, nevertheless, that any person appearing at said meeting of bondholders and claiming the right to participate therein, shall, if requested by any bondholder present thereat, produce the bond or bonds upon which such person may claim the right to vote at such meeting, or file an affidavit with the chairman of the meeting that he, the person so claiming the right to participate in such meeting, is the holder of one or more of the bonds aforesaid, or the proxy of such holder, in which affidavit he shall specify the amount and number of the bonds which he claims to hold, or represent, before being allowed to vote at such meeting, except for the purpose of temporarily organizing the same, and on the adjournment of such meeting all such affidavits shall be delivered to the trustee under these presents.

21 And this indenture further witnesseth, that the said party of the first part, for the consideration aforesaid, has promised and agreed, and does hereby covenant, promise and agree to and with the said party of the second part, and its successors, that the said party of the first part, its successors and assigns, shall and will well and truly pay, or cause to be paid, unto the holder or holders of said bonds, the principal and interest thereof, as the same shall become payable according to the tenor of said bonds and the terms of the coupons thereto annexed; and shall and will do, observe and perform any and every act and thing mentioned in or required by these presents, to be by it or them done, observed and performed, and that the said party of the first part, its successors and assigns, shall and will, from time to time, and at all times hereafter, and as often as thereunto requested by the trustee under this indenture, execute, acknowledge and deliver all such further deeds, conveyances and assurances in the law for the better assuring unto the said party of the second part, and unto its successors, upon the trusts herein expressed, the railway, equipments, appurtenances, franchises, property and things hereinbefore mentioned, and particularly any and all franchises whatsoever, which shall or may at any time hereafter, while the said bonds, or any of them remain unpaid, be acquired by the said party of the first part, its successors or assigns, as by the said trustee or by its counsel, learned in the law, shall be reasonably advised, directed or required.

In witness whereof, the said party of the first part has caused its corporate seal to be hereunto affixed, and these presents to be signed by its president and secretary on the day and year first above written, and the said party of the second part, in order to evidence its acceptance of the trust hereby created, has also caused its corporate seal to be hereunto affixed and these presents to be signed by its president and secretary.

THE CHICAGO, PEORIA AND ST. LOUIS RAILWAY COMPANY,

By —— ——, *President.*

[Corporate Seal.]

Attest: —— ——, *Secretary.*

THE MERCANTILE TRUST COMPANY OF NEW YORK CITY, *Trustee,*

By —— ——, *President.*

[Corporate Seal.]

Attest: —— ——, *Secretary.*

(Indorsed:) Filed September 21, 1893. James T. Jones, clerk.

22 And afterwards, to wit: on the 21st day of September, in the year last aforesaid, the following proceedings were had in said court in said cause and entered of record, to wit:

In the Circuit Court of the United States for the Southern District of Illinois, *ss:*

THURSDAY, *September* 21*st*, *A. D.* 1893.

Present: Hon. William J. Allen, district judge.

THE MERCANTILE TRUST COMPANY OF NEW York, Complainant,
vs.
THE CHICAGO, PEORIA AND ST. LOUIS RAILway Company, Defendant.
} In Equity. Consolidated Cause.

Order Appointing Receivers.

Now comes the Mercantile Trust Company of New York, by Alexander & Green, its solicitors, and C. B. Alexander, of counsel and come also R. J. Cavett, receiver, John M. Coughlin, *et al.*, Woodward & Tiernan Printing Company, St. Louis & Eastern Railway Company, by Bluford Wilson, their solicitor; comes also the Atchison, Topeka & Santa Fe Railroad Company, by George R. Peck, its solicitor; comes also the Chicago, Peoria and St. Louis Railway Company, by I. L. Morrison, its solicitor, and said parties, except the said defendant, The Chicago, Peoria & St. Louis Railway Company, move for the appointment of a receiver of all and singular the premises and property in the said bill of complaint of the Mercantile Trust Company and of the said several intervening bills, petitions and cross-petitions consolidated therewith, upon consideration whereof, and it appearing to the court from the papers filed in said causes consolidated that a receiver or receivers should be appointed for the property described in the said several bills, petitions and cross-petitions, the said Chicago, Peoria & St. Louis Railway Company objecting thereto, it does hereby order, adjudge and decree that C. H. Bosworth, of the city of Springfield, Illinois, and E. Ellery Anderson, of New York city, be and they are hereby appointed receivers of all and singular the said property above mentioned upon re-
23 spective-y executing a bond with good and sufficient security to be approved by this court, in the sum of fifty thousand dollars each, conditioned for the faithful performance of their several duties as such receivers respectively for obeying all the lawful orders of the court herein. Such bond may in the case of E. Ellery Anderson be executed before and the justification taken before a commissioner for the southern district of New York, and the surety may be approved by one of the judges of the circuit court of the United States for the southern district of New York, and upon approval of said bond and upon taking the official oath shall be sufficient qualification as receiver, the one first qualifying taking possession for the two jointly and such receiver shall forthwith be in possession of, operate and maintain said railroad and premises alone until the other receiver is qualified, being the railroad of the Chicago, Peoria & St. Louis Railway Company, comprising also the Jacksonville, Louisville & St. Louis Railroad

Company, the Litchfield, Carrollton & Western Railroad Company and the Louisville & St. Louis Railway Company, and including a partially constructed line of railway northwestwardly from Havana, together with all the constituent railroad lines now operated by said Chicago, Peoria & St. Louis Railway Company, commonly known as the "Jacksonville Southeastern line," more fully and particularly described as follows, to wit: Extending, lying and being a railroad from the city of Pekin through the counties of Tazewell, Mason, Cass, to and through the city of Jacksonville in the county of Morgan, and thence through the said county of Morgan and the counties of Macoupin and Montgomery to and through Litchfield, and thence through the counties of Montgomery, Macoupin, Madison and St. Clair, to East St. Louis, in the last-named county: and from Litchfield southeasterly through the counties of Montgomery, Bond and Clinton to Centralia, in the county of Marion, and thence through the county of Marion to Drivers, in the county of Jefferson; and from Havana, in said county of Mason to Petersburg, in the county of Menard, and thence to Springfield, in the county of Sangamon; also from Barnett westerly through Carlinville, in said county of Macoupin, thence through Carrollton, in the county of Greene to Columbus on the Illinois river, together with all interests in and contract rights and privileges for the use of the Peoria & Pekin Union railway from the said city of Pekin to the city of Peoria in the county of Peoria, and all terminal contract rights and privileges at East St. Louis, all in the State of Illinois, together with all equipment owned, leased or held in car trusts or otherwise, and the tolls, rents, incomes, franchises, issues and profits of the said Chicago, Peoria & St. Louis Railway Company, and its said constituent companies, and all their appurtenances as well as their land and other premises as now held, used and operated by the said company as fully described in their existing mortgages, deeds of trust, leases, contracts and other evidences of title and possession, reference thereto for greater certainty to be had, with all property rights, powers, privileges and franchises and equities now owned, possessed, held or controlled by the said The Chicago, Peoria & St. Louis Railway Company, it being the purpose and intention of this order to clothe the said receiver with all property rights, powers, privileges and franchises now owned, possessed, held or controlled by the said The Chicago, Peoria & St. Louis Railway Company, or any of the said constituent or affiliated lines now under a common management as the Jacksonville Southeastern line.

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It is further ordered, adjudged and decreed, that the said Chicago, Peoria & St. Louis Railway Company, its officers, agents, servants, employees and any and all persons in any way having the custody of any property or funds belonging to said railway company in any way shall turn over to the said receivers or receiver, on demand any and all property to which said receivers or receiver are entitled under this order, together with all books, moneys, assets, accounts, choses in action and property of every nature and kind belonging to or in the possession of the said defendant company or any of its constituents, and all persons are hereby forbidden in any manner

to interfere with the possession of said receivers or receiver or to prosecute any suit or suits against the defendant railway company without the consent of the court first had and obtained.

And the said receivers are hereby clothed with all the authority and rights usually given to receivers by courts of equity, to take charge of, care for and operate a railroad; to make report of his acts and doings at least every month to the court, and at any other time when ordered by the court; to collect and receive the tolls, rents, moneys, issues and profits of said premises and property as covered by this order, and out of the same they shall put, maintain and keep said property in good repair, and shall further pay—

First. All past-due taxes.

Second. All current operating expenses.

Third. All past-due wages as shown by the pay-rolls and on such proof as shall be satisfactory to the receiver or receivers.

Fourth. All claims for materials and supplies which have been incurred in the operation and maintenance of said property during the six months last past, and all ticket trackage traffic balances due from said railroad. To which last item number four counsel for the Mercantile Trust Company, trustee, objects, and which objection the court upon argument overrules. In their reports, so ordered to be made of receipts and expenditures and their doings under this order, the said receivers shall report whether there are any funds in their hands accruing from said income applicable to payment of interest or principal of any indebtedness of the said Chicago, Peoria and St. Louis Railway Company, or any of the constituent companies out of which by consolidation, lease or otherwise it has been formed, and power and authority are hereby reserved to any party interested in any of the constituent companies out of which said company was formed, to apply to the court for a direction to the receivers to keep an account of the receipts and expenditures of such constituent company so as to preserve and secure any special rights which the court may find to exist in favor of such constituent company, and all other matters not included in this order are reserved for the future consideration of the court.

And the said C. H. Bosworth comes and files his bond which is approved by the court, and takes the oath of office and accepts the office of receiver hereby conferred upon him.

And afterwards, to wit, on the twenty-seventh day of May, in the year of our Lord one thousand eight hundred and ninety-five, came the Terminal Railroad Association of St. Louis and filed in the clerk's office of said court its intervening petition in said consolidated cause, which petition is as follows, to wit:

26 *Intervening Petition of Terminal Railroad Ass'n of St. Louis.*

Filed May 27, '95.

In the Circuit Court of the United States, Southern District of Illinois.

THE MERCANTILE TRUST COMPANY OF New York *et al.* *against* THE CHICAGO, PEORIA & ST. LOUIS Railway Company *et al.* } Consolidated. In Equity.

Intervening petition of the Terminal Railroad Association of St. Louis.

Now comes the Terminal Railroad Association of St. Louis, a railroad corporation organized and existing under the laws of the State of Missouri, and by leave of court first had and obtained presents and filed this its intervening petition in the above-entitled cause, and for ground of intervention states:

That between the twenty-first day of March, 1893, and the twenty-first day of September, 1893, and within six months prior to the appointment of the receiver herein, it performed certain labor and furnished certain materials for, and to, and at the request of The Chicago, Peoria and St. Louis Railway Company, one of the defendants above named, the items of which are fully set forth in the statement of account herewith filed, marks "Exhibit A," and made a part hereof; which said account fully and correctly states the character and items of labor performed and materials furnished, and the times at which such labor was performed and materials furnished, and the respective charges therefor, which charges were the charges agreed upon between this intervenor and the said Chicago, Peoria and St. Louis Railway Company, and are fair and reasonable; that separate bills for each of said items comprising said account were furnished to and approved by said Chicago, Peoria and St. Louis Railway Company prior to the appointment of the receiver herein; and that all of said labor was performed and materials furnished within six months prior to the appointment of said receiver.

Wherefore this intervenor presents this its claim for the aggregate of said items of labor and material, fully set forth in said account herewith filed, amounting to the sum of eight thousand one hundred and sixty-two and eleven one-hundredths dollars ($8,162.11), and prays that the same may be allowed and ordered to be paid under the order of this court heretofore made herein directing
27 the payment by the receiver of debts incurred by said Chicago, Peoria and St. Louis Railway Company within six months prior to the appointment of the receiver.

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS,
By W. M. WATTS, *Solicitor.*

Chicago, Peoria & St. Louis R'y in acc't with Terminal R. R. Ass'n of St. Louis.

Statement of Unpaid Bills.

No. of bill.	What for.	Amount.
12121	Switching card, April, 1893	$528.00
12327	Breaking up trains, May, 1893	488.50
12403	Engine repairs, May, 1893	415.35
12467	Switching cars, May, 1893	698.50
12684	Breaking up trains, June, 1893	375.50
12717	Car repairs, June, 1893	2.63
12718	Engine repairs, June, 1893	388.88
12884	Switching cars, June, 1893	493.50
13015	Breaking up trains, July, 1893	668.00
13023	1/5 expense joint inspection, July, 1893	37.24
13048	Engine repairs, July, 1893	352.41
13146	Setting cars for transfer, July, 1893	5.00
13147	Cutting out cars, July, 1893	10.50
13148	Weighing cars, July, 1893	6.00
13149	Switching cars, July, 1893	599.00
13331	Pro expense, July, 1893	12.22
13342	Switching coaches, April & July, 1893	6.00
13363	Breaking up trains, August, 1893	822.00
13395	Engine repairs, August, 1893	312.04
13557	Switching, August, 1893	555.00
13683	Labor & material, track to Sept. 20th	20.55
13700	Breaking up trains to Sept. 20th	572.00
13737	Car repairs, to Sept. 20th	14.03
13738	Engine repairs, to Sept. 20th	183.26
13770	Weighing cars, to Sept. 20th	16.50
13771	Setting cars for transfer, to Sept. 20th	27.50
13775	Switching, to Sept. 20th	552.00
		$8,162.11

"Exhibit A."

(Indorsed:) Filed May 27th, 1895. James T. Jones, clerk.

28 Thon afterwards, to wit: on the eighth day of June, in the year last aforesaid, came the receivers in said consolidated cause and filed in the clerk's office of said court their answer to said intervening petition, which answer is as follows, to wit:

Answer of Receivers to Intervening Petition.

Filed June 8, '95.

In the Circuit Court of the United States for the Southern District of Illinois.

THE MERCANTILE TRUST COMPANY OF NEW YORK
against
THE CHICAGO, PEORIA & ST. LOUIS RAILWAY COMPANY. } In Chancery.

Answer of the receivers herein to the intervening petition of the Terminal Railroad Association of St. Louis.

These receivers, now and at all times hereafter, saving and reserving to themselves all benefit and advantage of exception or otherwise, that can or may be had or taken to the many errors, uncertainties and other imperfections in the said intervening petition contained, for answer thereto, say

That the facts set forth and alleged in said intervening petition may be true for anything they know to the contrary, but that they are utter strangers to all and every such matters, and cannot form any belief concerning the same, and therefore pray strict proof thereof.

And these receivers, further answering, deny that the petitioner is entitled to the relief, or any part thereof, in said intervening petition demanded, and prays the same advantage of this answer, as if they had pleaded or demurred to the said intervening petition.

BLUFORD WILSON,
Solicitor for Receivers.

(Indorsed:) Filed June 8th, 1895. James T. Jones, clerk.

29 Afterwards, to wit: on the sixth day of January, in the year of our Lord one thousand eight hundred and ninety-six, came Stuart Brown, Esq., one of the masters of this court, and filed in the clerk's office of said court, his report on said intervening petition, which report is as follows, to wit:

Report of Master on Intervening Petition.

Filed Jan. 6, '96.

In the Circuit Court of the United States, Southern District of Illinois.

MERCANTILE TRUST COMPANY
against
CHICAGO, PEORIA & ST. LOUIS RAILWAY COMPANY.

In the intervening petition of Terminal Railroad Association of St. Louis.

To the Hon. William J. Allen, judge presiding:

Your subscriber, one of the masters in chancery of this honorable court, to whom the above-styled intervention was referred under the general order of reference in the aforesaid cause, would respectfully report, that he has examined the petition and answer in said intervention, taken evidence and heard the argument of counsel, that there is due the said intervenor, Terminal Railroad Association of St. Louis, for labor and materials furnished, the sum of eight thousand one hundred and sixty-two $\frac{1}{100}$ —; that the aforesaid amount is a lien upon the property of the Chicago, Peoria & St. Louis Railway Company prior and superior to the claims of mortgage bondholders, under the order appointing the receivers in this cause, and that it should be paid out of surplus income or from a sale of the property of the said railway company.

All of the evidence taken on said claim is herewith submitted.

All of which is respectfully reported.

STUART BROWN,
Master in Chancery.

(Indorsed:) Filed January 6th, 1896. James T. Jones, clerk.

30 And afterwards, to wit: on the twenty-ninth day of January, in the year last aforesaid, came again the receiver in said consolidated cause, and filed in the clerk's office of said court exceptions to the report of said master, which exceptions are as follows, to wit:

Exceptions of Receiver to Report of Master.

Filed Jan. 29, '96.

In the Circuit Court of the United States for Southern District of Illinois.

MERCANTILE TRUST COMPANY OF NEW York *against* CHICAGO, PEORIA & ST. LOUIS RAILway Company.	Consolidated. In Equity.

Intervening petition of the Terminal Railroad Association of St. Louis.

Exceptions of the receiver to master's report.

Now comes C. H. Bosworth, receiver of the Chicago, Peoria and St. Louis Railway Company, by Bluford Wilson and P. B. Warren, his solicitors, and excepts to the report of the master filed herein on January 6, 1896, and for cause of exception shows to the court as follows:

First. That the said master has found in his said report that there is due to the intervenor, the sum of $8,162.11 for labor and materials furnished the Chicago, Peoria and St. Louis Railway Company, *and* whereas said master should have found that the said sum was due for terminal facilities furnished to the Jacksonville Southeastern line.

Second. That the said master has found in his said report, that the aforesaid amount is a lien upon the property of the Chicago, Peoria and St. Louis Railway Company, prior and superior to the claims of mortgage bondholders under the order appointing the receiver in this cause, and that it should be paid out of the surplus income, or from a sale of the property of the railway company; whereas, the said master should have found that the aforesaid amount is due the said petitioner, but is not a lien upon the
31 property of the railway company, prior or superior to the lien of the mortgage bondholders.

Third. The findings of the said master are unsupported by the evidence.

Fourth. The findings of the said master are contrary to the evidence.

Fifth. The findings of the said master are contrary to the law.

Wherefore this receiver prays that the said report of the master may be vacated and set aside, and that an order may be entered herein dismissing the said intervening petition of the Terminal Railroad Association of St. Louis.

(Indorsed:) Filed January 29th, 1896. James T. Jones, clerk.

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Afterwards, to wit, on the thirtieth day of July, in the June term of said court, in the year last aforesaid, the following proceedings were had in said court, in the matter of said intervening petition, and entered of record, to wit:

Decree on Intervening Petition.

In the Circuit Court of the United States, Southern District of Illinois.

THE MERCANTILE TRUST COMPANY OF NEW York *vs.* THE CHICAGO, PEORIA & ST. LOUIS RAILway Company *et al.*	In Equity. Consolidated Cause.

In the matter of the intervening petition of the Terminal Railroad Association of St. Louis.

And now on the 30th day of July, A. D. 1896, came again the said intervenor, The Terminal Railroad Association of St. Louis, by Samuel P. Wheeler, its counsel, and the said Mercantile Trust Company of New York, by Bluford Wilson, its counsel, and also C. H. Bosworth, receiver herein, by Bluford Wilson and P. B. Warren, his counsel, and this cause coming on to be further heard upon the exceptions of the said C. H. Bosworth, receiver, to the report
32 of the master in chancery herein, and the court having heard argument of counsel, and being sufficiently advised, doth order, adjudge and decree that said exceptions be and they are hereby overruled; and this cause coming on to be further heard on the report of the master in chancery filed herein, and it appearing to the court that during the six months next before the appointment of the receiver herein, the said intervenor, The Terminal Railroad Association of St. Louis, performed labor and furnished materials to the Chicago, Peoria and St. Louis Railway Company in the conduct of its business as a carrier of freight and passengers, and that said labor and material *was* reasonably worth eight thousand one hundred and sixty-two dollars and eleven cents ($8,162.11), and that said labor and material *is* embraced in the order appointing the receiver herein to be by him paid as a preferred claim.

It is therefore ordered, adjudged and decreed by the court that the receiver herein pay to the intervenor, The Terminal Railroad Association of St. Louis the said sum of eight thousand one hundred and sixty-two dollars and eleven cents ($8,162.11) out of the income of said receivership, if any such income is in his hands, and in case he has not the funds in hand for this purpose, it is ordered, adjudged and decreed that the same be paid out of the proceeds of the sale of the mortgaged premises in preference to the mortgage debt, and until paid the same is hereby declared a lien upon the said mortgaged estate superior to the lien of the mortgage herein.

And afterwards, to wit, on the sixteenth day of November, in the year last aforesaid, came again the receiver in said consolidated cause and filed in the clerk's office of said court, his petition for appeal, assignment of errors and bond on appeal, which are as follows, to wit:

33 *Petition for Appeal.*

Petition of Receiver for Appeal.

Filed Nov. 18, '96.

In the Circuit Court of the United States for Southern District of Illinois.

MERCANTILE TRUST COMPANY
against
CHICAGO, PEORIA & ST. LOUIS RAILWAY COMPANY. } Consolidated. In Equity.

In the matter of the intervening petition of the Terminal Railroad Association of St. Louis.

Petition for appeal.

The petition of C. H. Bosworth, receiver herein, showeth unto your honor that a final decree was rendered in the above-entitled cause on the 30th day of July, 1896.

Whereby it was ordered, adjudged and decreed that your petitioner should pay over to the said Terminal Railroad Association of St. Louis the sum of $8,162.11.

Your petitioner further states to your honor that he has assigned errors upon the record in said cause, specifying errors, as he alleges, in the record and judgment aforesaid. He therefore prays that your honor will grant an appeal from the said judgment and decree, to your petitioner, upon condition that he enters into bond in the sum of $500.00, with surety to be approved by this honorable court, in such time as your honor shall order and decree.

C. H. BOSWORTH, *Receiver*,
By BLUFORD WILSON AND
PHILIP BARTON WARREN,
His Solicitors.

(Indorsed:) Filed November 18th, 1896. James T. Jones, clerk.

34 *Assignment of Errors.*

Filed Nov. 18, '96.

In the Circuit Court of the United States for Southern District of Illinois.

MERCANTILE TRUST COMPANY
against
CHICAGO, PEORIA & ST. LOUIS RAILWAY COMPANY. } Consolidated. In Equity.

In the matter of the intervening petition of the Terminal Railroad Association of St. Louis.

Assignment of errors.

And now comes C. H. Bosworth, receiver herein, by Bluford Wi-son and P. B. Warren, his solicitors, and says there is manifest error in the record and proceedings in the above-entitled judgment and decree; and specifies the following, to wit:

1. The court erred in overruling the exceptions filed by the receiver to the report of the master.

2. The court erred in failing and refusing to sustain the exceptions filed by the receiver to the report of the master.

3. The court erred in ordering and adjudging that the petitioner was entitled to a valid and first lien on the property of the defendant railway company ahead of the mortgage indebtedness.

4. The court erred in failing and refusing to order, adjudge and decree that the claim of the intervenor was not entitled to a lien prior to that of the mortgage bondholders on the mortgaged premises of the defendant railway company.

5. The court erred in ordering, adjudging and decreeing the said C. H. Bosworth, as receiver, to pay to the intervening petitioner the sum of $8,162.11, with interest from said date, together with the cost in this case.

35 6. The court erred in ordering, adjudging and decreeing that the said intervenor be paid the sum of $8,162.11 out of the proceeds of the sale of the mortgaged premises of the defendant railway company ahead of the mortgage debt.

Whereby the plaintiff in error prays that the judgment and decree be reversed and annulled.

(Signed) BLUFORD WILSON &
PHILIP BARTON WARREN,
Solicitors for C. H. Bosworth, Receiver.

(Indorsed:) Filed November 18th, 1896. James T. Jones, clerk.

Bond on Appeal.

Filed Nov. 18, '96.

In the Circuit Court of the United States for Southern District of Illinois.

MERCANTILE TRUST COMPANY
against
CHICAGO, PEORIA & ST. LOUIS RAILWAY COMPANY.

In the matter of the intervening petition of the Terminal Railroad Association of St. Louis.

Bond.

Know all men by these presents, that we, C. H. Bosworth, as receiver of the Chicago, Peoria and St. Louis Railway Company, as principal, and Bluford Wilson as surety, are held and firmly bound unto the said Terminal Railroad Association of St. Louis in the penal sum of five hundred ($500.00) dollars, for the payment of which, well and truly to be made, the said receiver, as such binds himself and his successor, and the said surety binds himself, his heirs and personal representatives, jointly and severally by these presents.

Dated -his 18th day of November, 1896.

36 The condition of this obligation is such that whereas, on the 30th day of July, 1896, in the circuit court of the United States for the southern district of Illinois, in the above-entitled cause, it was ordered, adjudged and decreed by the court that the above-bounden C. H. Bosworth and Bluford Wilson should pay over to the said Terminal Railroad Association of St. Louis the sum of eight thousand one hundred and sixty-two and eleven one-hundredths dollars ($8,162.11), and from which decree the said receiver has appealed to the United States circuit court of appeals for the seventh circuit, upon the condition that the receiver should enter into bond in the sum of five hundred dollars ($500.00), with surety to be approved by the court.

Now, therefore, if the said receiver shall well and truly, without delay, prosecute the said appeal with effect and shall pay all costs and damages that may be adjudged against him, by reason of said appeal, and all costs that may accrue therein in case of dismissal of said appeal by appellant, then this obligation to be null and void, otherwise to remain in full force and effect.

C. H. BOSWORTH AS RECEIVER, [SEAL.]
As Receiver of the Chicago, Peoria & St. Louis R'y Co.
BLUFORD WILSON. [SEAL.]

Approved:
WILLIAM J. ALLEN,
United States District Judge.

(Indorsed:) Filed November 18th, 1896. James T. Jones, clerk.

Then afterwards, to wit: on the eighteenth day of November, in the June term of said court in the year last aforesaid, the following further proceedings were had in said court in the matter of said intervening petition and entered of record, to wit:

37 *Order Allowing Appeal and Approving Bond.*

In the Circuit Court of the United States for Southern District of Illinois.

MERCANTILE TRUST COMPANY *against* CHICAGO, PEORIA & ST. LOUIS RAILWAY Company. } Consolidated. In Equity.

In the matter of the intervening petition of the Terminal Railroad Association of St. Louis.

Order allowing appeal and approving bond.

Now, on this 18th day of November, 1896, the same being one of the days of the June term, A. D. 1896, of this court, come C. H. Bosworth, receiver herein, and files his petition for appeal from the order and decree of the court entered herein on the 30th day of July, 1896; and it appearing to the court that said petition is in due form, it is hereby ordered, adjudged and decreed that the prayer of said petition be, and the same is hereby granted; that the appeal be, and the same is hereby allowed the said C. H. Bosworth, receiver, from said order and decree of July 30th, 1896, to the United States circuit court of appeals for the seventh circuit, upon the said C. H. Bosworth, as such receiver, entering into bond in the sum of $500.00, with surety to be approved by this court; which bond it appears to the court is herewith submitted and approved.

Afterwards, to wit: on the nineteenth day of November, in the year last aforesaid, the following certificate of evidence was filed in the clerk's office of said court, to wit:

38 *Certificate of Evidence.*

Filed Nov. 19, '96.

On the 3rd day of September, 1895, before Stuart Brown, master in chancery, at his office in the city of Springfield, Illinois, in the matter of the intervening petition of the Terminal Railroad Association filed in the cause of "The Mercantile Trust Company of New York *et al.* against Chicago, Peoria & St. Louis Railway Company *et al.*," a consolidated cause now pending in the United States circuit court for the southern district of Illinois, the following testimony was taken, signatures of witnesses being waived by agreement:

In the Circuit Court of the United States for Southern District of Illinois.

MERCANTILE TRUST COMPANY OF NEW YORK
against
CHICAGO, PEORIA & ST. LOUIS RAILWAY COMPANY.

Intervening petition of the Terminal Railroad Association.

Mr. T. D. HINCHLIFFS sworn.

Q. Have you the custody and control of the unpaid vouchers of the J. S. E. line up to the appointment of receivers?

A. I have.

Q. Will you please refer to the voucher in favor of the Terminal Railroad Association of St. Louis and state the amount in gross vouchers in favor of this association for services rendered within six months before appointment of receivers?

A. $8,162.11 certified "Exhibit A."

Q. Is this paper shown you and certified by you a correct statement of the account?

A. It is a correct statement of the account payable within six months' rule.

Vouchers submitted to master in chancery for inspection and are all charged against Chicago, Peoria & St. Louis.

September 3rd, 1895.

STUART BROWN, *M. C.*

39 "EXHIBIT A."

Chicago, Peoria & St. Louis railway in account with Terminal Railroad Association of St. Louis.

Statement of Unpaid Bills.

No.	Date sent.	What for.	Amount.
12121	June 2.	Switching cars, April	$528.00
12327	June 9.	Breaking up trains, May	488.50
12403	June 16.	Engine repairs	415.35
12467	June 26.	Switching cars, May	698.50
12684	July 12.	Breaking up trains, June	375.50
12717	July 17.	Car repairs	2.63
12718	July 17.	Engine repairs	388.88
12884	Aug. 1.	Switching cars, June	493.50
13015	Aug. 14.	Breaking up trains	668.00
13023	Aug. 15.	$\frac{1}{15}$ expense joint inspection	37.24
13048	Aug. 19.	Engine repairs	352.41
13146	Aug. 24.	Setting cars for trains, July	5.00
13147	Aug. 24.	Cutting out cars	10.50
13148	Aug. 24.	Weighing cars	6.00
13149	Aug. 25.	Switching cars	599.00
13331	Sept. 9.	Pro expense	12.22

13342	Sept.	9.	Switching coaches, April & July.....	6.00
13363	Sept.	9.	Breaking up trains.....	822.00
13395	Sept.	9.	Engine repairs.....	312.04
13557	Sept.	30.	Switching, August.....	555.00
13683	Oct.	9.	Labor & material, tracks....	20.55
13700	Oct.	16.	Breaking up trains.....	572.00
13737	Oct.	16.	Car repairs.....	14.03
13738	Oct.	16.	Engine repairs.....	183.26
13770	Oct.	16.	Weighing cars...	16.50
13771	Oct.	16.	Setting cars for transfer.....	27.50
13775	Oct.	23.	Switching, September...	552.00
				$8,162.11

I certify these bills to be proper for payment under six months' limitation named in court order.

T. D. HINCHLIFFS, *Auditor.*

September 3rd, 1895.

40 Which said evidence with the exhibits was read on the hearing of said cause, and was all the evidence offered or heard upon the hearing thereof. Forasmuch as said matters do not appear of record, the said receiver, C. H. Bosworth, presents this certificate of evidence, and prays the court that the same may be signed, sealed and made a part of the record in this cause, and it is accordingly done this 19th day of November, 1896.

WILLIAM J. ALLEN, [SEAL.]
Judge of the District Court for the Southern District of Illinois.

(Indorsed:) Filed November 19th, 1896. James T. Jones, clerk

Certificate of Clerk.

UNITED STATES OF AMERICA, *Southern District of Illinois,* } ss:

I, James T. Jones, clerk of the circuit court of the United States in and for the southern district of Illinois, do hereby certify that the foregoing is a true and complete copy of all the papers filed and proceedings thereon had in the matter of the intervening petition of the Terminal Railroad Association of St. Louis, filed in a certain consolidated cause, wherein The Mercantile Trust Company is complainant, and The Chicago, Peoria and St. Louis Railway Company is defendant, as truly and completely as the same appear of file and record in my office.

In witness whereof I have hereunto set my hand and seal of said court at Springfield in said district, this twenty-third day of November, in the year of our Lord one thousand eight hundred and ninety-six, and of our Independence the one hundred and twenty-first year.

[SEAL.] JAMES T. JONES, *Clerk.*

41 October Term, A. D. 1896.

At a regular term of the United States circuit court of appeals for the seventh circuit, begun and held at the United States court-rooms, in the city of Chicago, in said seventh circuit, on the fifth day of October, 1896, of the October term, in the year of our Lord one thousand eight hundred and ninety-six, and of our Independence the one hundred and twenty-first year.

And afterwards, to wit, on the second day of December, 1896, in the October term last aforesaid, came the appellant, by his counsel, and filed in the clerk's office of said court his appearance; which said appearance was in the words and figures following, to wit:

United States Circuit — of Appeals for the Seventh Circuit, October Term, 1896.

C. H. BOSWORTH, Receiver, etc.,
vs.
TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, Intervening Petitioner. } No. 367.

The clerk will enter my appearance as counsel for the appellant.
BLUFORD WILSON AND
P. B. WARREN.

NOTE.—Must be signed by a member of the bar of the United States circuit court of appeals for the seventh circuit. Individual and not firm names must be signed.

Endorsed: Filed Dec. 2, 1896. Oliver T. Morton, clerk.

And afterwards, to wit, on the eighth day of March, 1897, in the October term last aforesaid, came the appellee, by its counsel, and filed in the clerk's office of said court its appearance; which said appearance was in the words and figures following, to wit:

42 United States Circuit — of Appeals for the Seventh Circuit, October Term, 1896.

C. H. BOSWORTH, Receiver, etc.,
vs.
TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, Intervening Petitioner. } No. 367.

The clerk will enter my appearance as counsel for the appellee.
SAMUEL P. WHEELER.

NOTE.—Must be signed by a member of the bar of the United States circuit court of appeals. Individual and not firm names must be signed.

Endorsed: Filed March 8, 1897. Oliver T. Morton, clerk.

And afterwards, to wit, on the third day of May, 1897, in the term last aforesaid, in the record of the proceedings thereof in said entitled cause appears the following entry, to wit:

Before Hon. William A. Woods, circuit judge; Hon. James G. Jenkins, circuit judge; Hon. John W. Showalter, circuit judge.

C. H. BOSWORTH, Receiver, etc.,
vs.
TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, Intervenor. } 367.

It is ordered by the court that this cause be, and the same is hereby, set down for hearing May 19, 1897.

And afterwards, to wit, on the nineteenth day of May, 1897, in the term last aforesaid, came the appellee, by counsel, and
43 filed in the clerk's office of said court its appearance; which said appearance was in the words and figures following, to wit:

United States Circuit Court of Appeals for the Seventh Circuit, October Term, 1896.

C. H. BOSWORTH, Receiver, etc.,
vs.
TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, Int. Petitioner. } No. 367.

The clerk will enter my appearance as counsel for appellee.
M. F. WATTS.

NOTE.—Must be signed by a member of the bar of the United States circuit court of appeals for the seventh circuit. Individual and not firm names must be signed.

Endorsed: Filed May 19, 1897. Oliver T. Morton, clerk.

And afterwards, to wit, on the nineteenth day of May, 1897, in the term last aforesaid, in the record and proceedings thereof in said entitled cause, appears the following entry, to wit:

Before Hon. William A. Woods, circuit judge; Hon. James G. Jenkins, circuit judge; Hon. John W. Showalter, circuit judge.

C. H. BOSWORTH, Receiver, etc.,
vs.
TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, Intervenor. } 367.

Now, this day, came the parties, by their counsel, and this cause now comes on to be heard on the printed record and briefs of counsel and on oral arguments by Mr. Bluford Wilson and Mr. P. B. Warren, counsel for appellant, and by Mr. Samuel P. Wheeler and Mr. M. F. Watts, counsel for appellee, and the court, having
44 heard the same, takes this matter under advisement.

And afterwards, to wit, on the eighth day of June, 1897, in the term last aforesaid, the court delivered its opinion in said cause; which opinion is in the words and figures following, to wit:

45 In the United States Circuit Court of Appeals for the Seventh Circuit, October Term, 1896, May Session, 1897.

C. H. BOSWORTH, Receiver of the Chicago, Peoria and St. Louis Railway Company, Appellant,
v.
TERMINAL RAILROAD ASSOCIATION OF ST. Louis, Intervening Petitioner.

No. 367. Appeal from the Circuit Court of the United States for the Southern District of Illinois.

Before Woods, Jenkins, and Showalter, circuit judges.

In a suit brought by the Mercantile Trust Company on the 21st day of September, A. D. 1893, to foreclose a mortgage upon the Chicago, Peoria and St. Louis railway, the court appointed a receiver with the authority usually conferred upon receivers in the charge and operation of railways and in the general administration of the estate, and required the receiver to pay (1) all past-due taxes, (2) all current operating expenses, (3) all past-due wages, (4) "all claims for materials and supplies which have been incurred in the operation and maintenance of said property during the six months last past and all ticket, trackage and traffic balances due from said railroad;" to this last item the Mercantile Trust Company objected, which objection the court overruled.

On the 27th day of May, 1895, The Terminal Railroad Association of St. Louis, the appellee, filed its intervening petition asserting a claim against the railway company amounting to $8,162.11 for switching, engine and car repairs, etc., done within six months prior to the date of the order appointing a receiver and asking for
46 the allowance of the claim as a preferential claim under the order of the court appointing the receiver. An answer was filed to this petition by the receiver asserting that the facts stated might be true for anything known to the contrary, but, being stranger to the matters, he demanded strict proof, and denying that the petitioner was entitled to the relief demanded. The intervening petition under a general order of reference went to the master whose report was to the effect that the claim was a just one and that the amount is a lien upon the property of the railway company prior and superior to the claims of the mortgage bondholders under the order appointing the receiver, and that it should be paid out of the surplus income or from a sale of the property of the railway company. To this report the receiver filed exceptions, not impu-ning the finding of the master that the claim was a just one against the company but to the finding that the claim should be paid from the surplus income or from a sale of the property of the railway company, "whereas," the exception proceeds, "the said master should have found that the aforesaid amount is due the said petitioner but is not a lien upon the property of the

railway company prior or superior to the lien of the mortgage bondholders." Upon hearing the court, on July 30, 1896, overruled the exceptions and entered a decree allowing the claim at the amount stated; and declaring that it was a claim of the character embraced in the order appointing the receiver to be paid as a preferred claim and directing that the receiver pay to the intervenor the amount of the claim "out of the income of said receivership, if any such income is in his hands, and in case he has not the funds in hand for this purpose it is ordered, adjudged and decreed that the same be paid out of the proceeds of the sale of the mortgaged premises in preference to the mortgage debt, and until paid the same is hereby declared a lien upon the said mortgaged estate superior to the lien of the mortgage herein." To this decree the receiver assigned error in substance to the effect that the court erred in adjudging that the claim of the intervening petitioner was entitled to priority to the mortgage debt. The receiver thereupon prayed an appeal which was allowed.

JENKINS, circuit judge, delivered the opinion of the court:

The contention of the receiver is thus stated in the brief of his counsel: "The question thus presented to this court for determination is one as to the displacement of vested contract liens by unsecured creditors. There is no controversy as to the labor having been performed or the materials furnished within the six months next prior to the appointment of the receiver of the insolvent corporation, nor as to the value of the same. The only con-
47 troversy is as to whether or not the appellee is entitled on its petition and proof made thereunder to have the vested lien of the mortgagee displaced to the extent of his claim." He insists that the provision in the decree appointing a receiver providing for the payment of certain claims as preferential created no vested right, and that within our ruling in *Mather Humane Stock Transportation Company v. Anderson*, 46 U. S. App., 138, the decree in that regard was interlocutory and is not controlling of the subsequent action of the court; and that within the doctrine declared in *Turner v. The Indianapolis, Bloomington and Western Railway Company*, 8 Bissell, 315; *Fosdick v. Schall*, 99 U. S., 235; *Union Trust Company v. Souther*, 107 U. S., 591; *Burnham v. Bowen*, 111 U. S., 776; *Union Trust Company v. Illinois Midland Railway Company*, 117 U. S., 432; *Wood v. Guarantee Trust and Safe Deposit Company*, 128 U. S., 416; *Kneeland v. American Loan and Trust Company*, 138 U. S., 89; *Thomas v. Western Car Company*, 149 U. S., 111; *Farmers' Loan and Trust Company v. Green Bay, W. & St. P. Railway Company*, 45 F. R., 664, before a claim can be deemed to be preferential to the mortgage debt, there must be first established a diversion of income from the payment of operating expenses to the payment of interest and that, failing diversion, there can be no restoration. The broad ground is taken that a court of equity, assuming at the request of a trustee the operation of a railway, has not the right to provide for the payment out of the income or the corpus of the road, of operating expenses incurred within a limited time prior to the suit,

unless there has been diversion of income and then only to the extent of such diversion.

It is, however, objected by the appellee that with this question the receiver is not concerned and that, the justice of the debt being conceded, it is none of his affair that it is preferred by the decree to the mortgage debt. This contention, we think, must be sustained. While it is true that a receiver is the instrument of the court for the conservation of the estate which the court has taken into its possession for administration, it is also true that in a sense he represents all parties in interest. His duty is to defend the estate against all claims which he deems to be unjust; his duty is to conserve the estate as a whole for its distribution by the court among those who shall be adjudged to be entitled; he represents the estate, with right to sue to recover demands due to it; with right to defend it against claims asserted. In this respect we concur with the circuit court of appeals for the fourth circuit that this duty carries with it the right and the duty, in case of doubtful claim, to take the judgment of the court of last resort. *Thom v. Pittard*, 8 U. S. App., 597. This right and duty should, however, be limited in its exercise to those cases in which the es-
48 tate, as a whole, is interested to enforce a right or to defend against a claim asserted. In respect to many matters, the receiver has no right of appeal, while in respect to others, his right to appeal may not be gainsayed. Thus, he may rightfully appeal from a decree refusing him compensation, or disallowing his accounts, or establishing a claim against the estate or denying a claim asserted for the estate. He has no right to appeal from a decree removing him from his position, for that is matter of discretion with the court appointing him and he holds his position by the sufferance of the court; nor has he the right of appeal from a decree authorizing an issue of receivers' certificates, or directing a particular management of the trust property, or directing sale of the mortgaged property or confirming its sale, or directing the turning over of property in his hands; for he is neither the censor of the court nor interested in the event. Illustrations might be multiplied. The true line of demarcation, we think to be this: He has the right of appeal with respect to any claim asserted by or against the estate, for therein he is the representative of the entire estate; he has the right of appeal from any decree which affects his personal right for therein he has an interest; but he has not the right of appeal from a decree declaring the respective equities of parties to the suit. He should therein be indifferent and not a partisan. His duty is to all parties in common. He should not become the advocate of one against another. *Security Trust Company v. Sullivan*, 45 U. S. App., 601, 603.

The record here is not complete. There has been brought to this court only so much of the record as is thought to bear upon the particular question which the receiver desired to present. It was, however, conceded at the argument that prior to the decree appealed from, the railway had been sold under decree of sale and had passed out of the possession of the receiver and into the possession of the purchaser, and that the receiver had not in hand moneys with which

to pay the debt adjudged. That this debt was a just claim against the estate is not doubted and is conceded. No objection is taken to its allowance, nor is it questioned that under the decree appointing the receiver it was a proper claim to be paid in preference to the mortgage; but the receiver asserts that the decree allowing preferential claims was improvident and that the mortgage had preference in payment because there had been in fact no diversion of income to the payment of interest. Neither the trustee, nor the bondholders, nor the purchaser is here objecting. Who made the receiver the guardian of their interests in this regard? What duty is imposed upon him to assert the supposed right of one creditor over another in respect to a common fund;
and this, whether the estate remains in his custody or has passed
49 from his possession and control under decree and sale? By what right does he become the partisan advocate when his duty demands of him impartiality and indifference with respect to the division of this common fund? By what authority may he assert the rights of a purchaser? By what right does he undertake to prevent the enforcement of this claim against the purchased estate, presumably by the decree of sale charged as a lien upon it? He has no such right. He is in so doing an interloper obtruding himself in breach of his duty where he has no right, and in a matter with which he is not concerned. To sanction such action is to encourage vexatious litigation at the expense of the estate which should be cast upon the interested parties, and to hold out the temptation to a receiver and his counsel to swell the cost of administration by assuming litigation with which he has not right to interfere.

It was held in *Farlow v. Kelley*, 131 U. S. Appendix, CCI. that the allowance by a circuit court of an appeal taken by a receiver is equivalent to leave by the court to the receiver to take an appeal, and it is urged that since the appeal here was allowed by the circuit court according to usual practice, we are bound to entertain it and to determine the question which the receiver has presented. In some States it is held that no case may be appealed by a receiver without permission, notwithstanding parties may appeal as of right and without leave. The Supreme Court, in the case referred to, merely holds that if leave were essential it was granted by the usual allowance of an appeal; but it is nowhere held, and the doctrine cannot be sanctioned, that the allowance of an appeal can operate to clothe the receiver with an interest which he has not, or can impose upon an appellate court the duty of hearing and determining a moot question.

The appeal will be dismissed.

50 And afterwards, on the same day, to wit, on the eighth day of June, 1897, in the term last aforesaid, in the record and proceedings thereof in said entitled cause appears the following entry, to wit:

Before Hon. William A. Woods, circuit judge; Hon. James G. Jenkins, circuit judge; Hon. John W. Showalter, circuit judge.

C. H. BOSWORTH, Receiver, etc.,
vs.
TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, Intervenor. } 367.

Appeal from the circuit court of the United States for the southern district of Illinois.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the southern district of Illinois and was argued by counsel.

On consideration whereof it is now here ordered, adjudged, and decreed by this court that this cause be, and the same is hereby, dismissed with costs.

And afterwards, to wit, on the twenty-fifth day of June, 1897, in the term last aforesaid, came the appellant, by his counsel, and filed in the clerk's office of said court his petition for a rehearing; which petition was in the words and figures following, to wit:

51 In the United States Circuit Court of Appeals for the Seventh Circuit, October Term, A. D. 1896.

C. H. BOSWORTH, Receiver, Chicago, Peoria & St. Louis Railway, Appellant,
vs.
TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, Intervening Petitioner, Appellee. } No. 367.

Petition for Rehearing.

Bluford Wilson, Philip Barton Warren, solicitors for petitioner.

Filed Jun- 25, 1897.

OLIVER T. MORTON, *Clerk.*

52 In the United States Circuit Court of Appeals for the Seventh Circuit, October Term, A. D. 1896.

C. H. BOSWORTH, Receiver Chicago, Peoria & St. Louis Railway, Appellant,
vs.
TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, Intervening Petitioner, Appellee. } No. 367.

Petition for Rehearing.

Now comes the appellant and prays that a rehearing be granted in this cause, and that the decision of this court filed herein on the 7th day of June, 1897, and any order to be entered thereon dismissing the appeal, may be set aside, and that an order may be entered reversing said decision and granting to this petitioner the relief herein prayed.

53 For grounds of this petition, appellant submits the following:

POINT I.

This court misapprehended a most material fact.

In its opinion at page 2, the court says:

"The contention of the receiver is thus stated in the brief of his counsel: 'The question thus presented to this court for determination is one as to the displacement of vested contract liens by unsecured creditors. There is no controversy as to the labor having been performed or the materials furnished within the six months next prior to the appointment of the receiver of the insolvent corporation, nor as to the value of the same. The only controversy is as to whether or not the appellee is entitled on its petition and proof made thereunder to have the vested lien of the mortgagee displaced to the extent of his claim.'"

(*a.*) It was not intended to concede the demand to be a just claim against the estate.

The court has correctly stated the contention of the receiver, but we submit it has drawn from the language used by his counsel an erroneous conclusion, viz: (Opinion, page 4):

"That this debt was a just claim *against the estate* is not doubted *and is conceded.*

The distinction between the concession made by the receiver and the conclusion drawn by the court is vital, in the determination of the receiver's right to appeal. The receiver admits the claim
54 to be just as against the *railway company*, but *expressly denies* it to be just as *against the estate* in his hands for conservation.

We would find no difficulty in agreeing with the conclusion of the court that the receiver had no interest in the appeal, if we conceded that debt to be a just claim against the estate, for then clearly it would be a matter of indifference to him how it was satisfied. But the concession of the receiver is that as against the railway company only, and not against the estate, is the claim just.

(*b.*) The conclusion of the court is based on this supposed concession.

The above fact is apparent from the language used throughout the opinion of the court. At the very beginning of the discussion of this question (Opinion, p. 3) it says of the receiver that—

"His duty is to *defend the estate against all claims* which he deems to be unjust; his duty is to conserve the estate as a whole for its distribution by the court among those who shall be adjudged to be entitled; he represents the estate, with right to sue to recover demands due to it; *with right to defend it against claims asserted.*"

And again (Opinion, page 4) the court says:

"The true line of demarcation, we think to be this: He has the right of appeal with respect to any *claim asserted* by or *against the estate*, for therein he is the representative of the entire estate."

55 Having thus announced his duty to defend the estate against all claims, and his right to appeal with respect to any claim asserted against the estate, the court bases its conclusion that in this particular instance the receiver was not in the line of his duty, nor had the right of appeal, on the premise that the receiver, by admitting the claim to be just against *the railway company*, thereby conceded it to be just as *against the estate.*

That such conclusion is based upon that misapprehended concession is clearly shown by this language (Opinion, p. 4):

"*That the debt was a just claim against the estate is not doubted, and is conceded. No objection is taken to its allowance*, nor is it questioned that under the decree appointing the receiver it is a proper claim to be paid in preference to the mortgage."

That the demand of the Terminal Railroad Association is a claim *asserted solely* against the estate is a fact that cannot be seriously denied, and as it is necessary to discuss the same under a subsequent point, we will not repeat it here.

56 POINT II.

The receiver is appointed to protect the estate for whomsoever may be ultimately entitled thereto.

The interest a receiver has in the estate for which he is appointed in railway foreclosures was declared in the early case of *Fosdick vs. Schall*, 99 *U. S.*, 235, where the Supreme Court said:

"He holds, pending the litigation, for the benefit of whomsoever *in the end* it shall be found to concern, and in the meantime the court proceeds to determine the rights of the parties upon the same principles it would if no change of possession had taken place."

Again in *Booth vs. Clark*, 17 *Howard*, 322, it is said:

"He is appointed for the benefit of all parties who may establish rights in the cause."

(a.) Presumptively the mortgagee is entitled to the estate.

It is not to be overlooked that this receiver was appointed on a bill filed by the mortgagee to foreclose this estate, and that therefore there is a great distinction between cases of this kind and cases where a receiver is appointed in proceedings to wind up the general affairs of a corporation or to dissolve a partnership. In the latter cases a court takes possession of the property for the very
57 purpose of dividing it between all classes of creditors, while in cases for the foreclosure of a mortgage the court takes possession of the property to apply it to the payment of the mortgage creditor, if such mortgagee proves the allegations of its bill. The very fact that a court will, on the application of the mortgagee, take possession of the estate, is conclusive of the *prima facie* case thus made by the complainant. So that primarily the court holds the property to satisfy the debt of the mortgagee, and as between the mortgagee and an unsecured creditor the presumption is that the former is entitled to the estate which the receiver is conserving.

(*b.*) By intervening an unsecured creditor does not establish a right in the cause.

In *Booth vs. Clark, supra*, it was said the receiver represents all parties who establish rights in the cause, but we submit that the entry of a decree in the lower court making intervenor's claim a prior lien, unless unappealed from, does not finally establish a right in the cause. And we therefore contend that the receiver is in no way the representative of an intervenor until the decree of the lower court has been affirmed or remains unappealed from.

This distinction has been clearly recognized by this court in the case of *McLeod vs. City of New Albany*, 66 *Fed. Rep.*, 378, where, in determining the matter presented on appeal, it was necessary
58 for the court to define who a receiver represented in respect to the conservation of the property for which he was appointed. There the court held, at page 381, *not that he represented every party* who might come into the original cause *by intervention*, but that he represented all parties to the *original bill*.

POINT III.

Appellee attempts to diminish the estate which appellant is to conserve.

Again calling the court's attention to the fact that appellant has always resisted appellee's claim *as against the estate*, we respectfully submit that in carrying that resistance to the court of last resort he does not make himself a partisan as between the real parties to the issue before the court in the cause in which he was appointed, viz: the foreclosure of a certain mortgage; but that he is doing all in his power to conserve the estate for whomsoever shall be ultimately entitled to it, and that thereby he is doing what was expressly approved by this court in *McLeod vs. City of New Albany*, 66 *Fed. Rep.*, 378, viz: to contest the right of the stranger to participate in this estate and thus diminish it.

59 (*a.*) His duty is to defend the estate against all claims which he deems to be unjust.

In the opinion rendered by the court in the case at bar it is said of the receiver that

"His duty is to *defend the estate* against all claims which he deems to be unjust."

In this case the receiver admits that there is no defense to the claim as against the railway company, *but that as against the estate* he deems it to be unjust and that there is a good and valid defense to it. In interposing that defense and carrying it to the court of last resort is he not performing the very duty which this court assigns to him?

(*b.*) This duty has been announced and recognized repeatedly by this court.

In *McLeod vs. City of New Albany*, 66 *Fed. Rep.*, 378, a case abso-

lutely on "all fours" with this case, this court announced most emphatically, not only that it was the duty of the receiver to preserve the estate, but that on an appeal from a decree of the lower court adjudging the claim of an unsecured creditor to be prior to that of the vested mortgage lien, the receiver could not object that the original parties to the foreclosure cause were not parties to the appellate proceeding, *because he, the receiver, represented them,*
60 in this appellate court *for the purpose* of contesting the claim of an unsecured creditor to displace their vested lien, and further, because they were not objecting that they were not *well* represented.

We earnestly urge that this court will seriously consider the McLeod case, and take the liberty of here presenting an abstract of the facts, which make it identical with the case at bar, for the purpose of showing that the conclusions reached by the same court in this case conflicts therewith.

In the McLeod case, McLeod was appointed receiver of the property of the Kentucky and Indiana Bridge Company in a suit brought against it and the trustees of its mortgage, by the Youngstown Bridge Company. In this suit *an unsecured creditor*, the city of New Albany, filed its intervening petition for the payment of taxes *accrued prior to the receivership*, and prayed that the same be paid out of the funds in the hands of the receiver *prior* to the claim of *any other creditor.*

This intervention was referred to a master in chancery, who reported in favor of the unsecured creditor. The receiver excepted to this report but his exceptions were overruled, the master's report confirmed, and the lower court entered a decree directing the receiver to pay the amount found due. From this the receiver appealed to this the seventh circuit court of appeals.

61 Among other errors assigned was a defect of proper parties. The receiver urged not only that the mortgagee should have been made a party, but also all of the parties to the *original* suit. This contention presented fairly and squarely the question as to whether or not the receiver had sufficient interest, in a controversy between various creditors, claiming priority over each other, out of the estate for which he was appointed to conserve, to present the matter for final determination to the court of last resort; or whether or not it was necessary that the particular party whose lien was sought to be displaced should have been made a formal party to the intervening petition in the lower court, and have appealed from its decision, if the same displaced its lien. And in that case this court *decided that very question*, and not only held that it was the duty of the receiver to resist the payment of the taxes out of the estate which he was appointed to conserve, but went further and held that the receiver had sufficient interest in the matter *to fully represent on appeal the parties to the original cause*, whose vested lien the intervenor was attempting to displace.

The language used by the court in arriving at the above conclusions (page 381) is:

"The other parties whose presence is suggested as essential *are*

parties to the original bill as holding incumbrances upon the property subordinate to the lien of the complainant. They were in
62 court in the suit in which the receivers were appointed, and were bound to take notice of the intervening petition of the city filed in that suit, and of the proceedings thereunder. It was not necessary that they should be made formal parties to the petition. Being parties to the suit, they were, in fact, parties to the intervening petition. The receivers in respect to the conservation of this property *represent all parties to the original bill.* It was their duty to preserve the estate and thereto to pay the taxes thereon. If the taxes were illegally laid, it was their duty, representing all in interest, to contest payment. If parties to the original bill desired to take active part in such contest they had a right to be heard, and such right, if demanded, would doubtless have been accorded to them. They did not so ask, although being parties to the suit they were obligated to take notice of the proceedings. *They are not here objecting that they were not well represented by the receivers.* The latter cannot for the first time, after full hearing upon the merits before the master, object *that those they represented* should be formally notified of the petition."

If, therefore, as this court above holds, *that a receiver cannot object* that the parties whose lien the intervenor seeks to postpone is not a *formal* party, upon what principle of justice *can the intervenor* set up such a purely technical defense; if this court will not sustain the contention that the receiver does not represent all the parties to the original bill, *when made by the receiver*, why will it sustain the same contention *when made by an unsecured creditor?*

Can it be said that the claim of the city of New Albany for taxes in the McLeod case, differs in character from the claim of the Terminal Railroad Association in the case at bar, for material furnished? Both are unsecured creditors whose demands ac-
63 crued prior to the receivership, and the intervening petitions of both pray a priority over the vested contract lien of the mortgagee, and seek payment of the same out of the estate in the hands of the receivers. Or is there such a difference even in degree, which would sustain the vital distinction that in the first case the receiver has sufficient interest in the estate to warrant his appealing from a decree which would diminish that estate, *and in so appealing he represents all of the parties to the original bill*, while in the latter case he has neither the interest nor represents the parties to the original bill, who claim to be ultimately entitled to the estate he was appointed to protect?

We now beg respectfully to direct the court's attention to a number of cases in which this court has clearly recognized and sanctioned this very receiver's right to appeal from an order of the lower court, which diminished the estate he was appointed to protect, *and which declared "the respective equities of parties to the suit," as that term is applied in the opinion in this case.*

Mather Humane Transportation Co. vs. Anderson, 76 *Fed. Rep.*, 164, arose in this very foreclosure suit; the lower court entered a decree disallowing intervenor a priority over the mortgage lien for car

rentals ; from this decree intervenor appealed to this court *making only the receiver appellee.* In disposing of the case this court
64 permitted the receivers to resist intervenor's right to priority and sustained their contention in that regard. *No other parties were before the court.*

Hook vs. Bosworth, 64 *Fed. Rep.*, 443, was also a controversy which grew out of this same foreclosure proceeding. In that case Mr. Justice Jenkins, speaking for the court even went so far as to hold that Bosworth represented *solely* the trustee of the bondholders in a litigation which sought to subject certain earnings of the defendant railway company which accrued prior to the appointment of the receiver to the lien of the mortgagee. In view of the fact that the receiver there contended that he not only represented the bondholders, but also the general creditors of the company, this holding becomes more significant, inasmuch as the court, to prevent the recovery of those prior earnings by the receiver, based its conclusion that the receiver represented *only the trustee*, on the fact that he did not represent the general or unsecured creditors ; and so in the very beginning of the litigation arising out of this foreclosure, this court emphatically and unqualifiedly indicated to this receiver that he represented the trustee of the bondholders, and no one else.

The court may remember that there, William S. Hook and Marcus Hook, as officers of the railway company, after the receiver had been appointed, collected moneys from the Federal Government for the transportation of mails by the railway company. The
65 receiver conceiving himself to represent both the secured and unsecured creditors, and the money to be a part of the estate for which he was appointed to conserve, filed a petition against the Hooks to recover the same. The lower court sustained the receiver's position, but was reversed by this court on the theory that the receiver represented solely the trustee, as is shown by the following language from the opinion at page 449 :

"So that the complainant trustee, *or the receivers as its representatives* have no right to the earnings prior to the filing of this bill. * * * What right the receivers would have to the fund earned prior to the filing of the bill, *if they represented judgment creditors*, we do not find it necessary to determine. As we have before observed, the record discloses that certain intervening petitions, cross-petitions and bills (some of them filed in the cause of The Mercantile Trust Company against The St. Louis & Chicago Railway Company, of the nature of which suit we are not informed) were ordered to be consolidated with the principal cause for the foreclosure of the trust deed or mortgage. The record is wholly silent with respect to the nature of those petitions, cross-petitions and bills, and to the character which the petitioners, cross-petitioners and complainants therein assumed. We are only told that those proceedings, whatever they were, were consolidated with the principal suit. * * * *We are, therefore, unable to say that the appellees (receivers) represent creditors as well as the trustees.* We cannot, therefore, adopt the suggestion of counsel that these intervening petitions, etc., represent

'labor, supply and traffic balance creditors.' The fact does not appear from the record. We cannot assume it.

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It would seem inequitable, under such circumstances, that they should be called upon to respond to the receivers for the amount so paid, *unless possibly* it might be claimed that *they had no right*, after
the appointment of receivers, to receive or to so disburse the
66 monies *as against representatives of creditors*, appropriating it wholly to the payment of debts of their selection, when the debts discharged had only right to share ratably with other indebtedness of the corporation. *We are*, however, from this record, *unable to regard these receivers as representatives of others than the trustee of the mortgage*, who is not entitled to the earnings prior to the receivership."

Can it be said that the position in which this court thus placed the receiver at the beginning of the litigation which arose out of this foreclosure, is in harmony with the position it assigns to him in the case at bar? If not, can it be said that circumstances have arisen which warrant such a radical change? We respectfully submit that as far as the conditions appear from this record they are identical in every detail as those which were disclosed by the record in *Hook vs. Bosworth, supra*, and although the court may personally know that a sale and transfer of the property has taken place, we submit that this case should be decided on the record just as *Hook vs. Bosworth* was. There the court said it would not take the suggestion of counsel as to any fact which did not appear in the record—that it could not "assume it." And for the reason that certain facts did not appear in the record, it there held the receiver to represent solely the mortgagee.

Another case in which this court recognized and sanctioned the receiver's right to resist to the court of last resort, the effort of an unsecured creditor to displace the vested lien of the mortgagee, is
Bosworth vs. National Bank, 64 Fed. Rep., 615. In that case
67 the bank filed its intervening petition in the foreclosure cause, alleging an indebtedness to it by the railway company of $10,000, upon which $2,500 had been paid in cash, and the balance by two drafts drawn on a traffic balance due from another railroad; that the payment of these drafts had been stopped by the receiver; and thereupon prayed an order directing the receiver to pay the same. The court says:

"The claim on the part of the bank is that the drawing of the drafts constituted an appropriation in equity to that extent of the said fund in the hands of the drawee, which gave the bank a lien thereon *pro tanto* in *preference to other creditors*, although said drafts were never accepted or paid by the drawee."

So it is, therefore, to be seen that in that case also, we have a stranger to the original bill intervening in the cause, and claiming the right to have his debts paid out of the estate in the hands of the receiver, ahead of all other creditors. The receiver, while not questioning the validity of the debt as against the railway company,

considered it his duty to resist the payment out of the estate in his hands. His position is thus stated by the court:

"The contention on the part of the receivers is that, inasmuch as the drafts were not presented or accepted, or the money paid before the railway went into the hands of receivers, and the money was then paid over to the receivers on demand, no lien attached to the money in the hands of the drawee, and that the receivers hold it as trustees for the benefit of the railway company and its general creditors."

68 The circuit court sustained the contention of the bank, viz., that it had a lien prior to all other creditors, and directed the receivers to pay it $7,500 out of the estate in their hands. Was not this a decree distributing the assets of the insolvent corporation between conflicting creditors and giving one a right prior to all others? Yet from this decree the receivers appealed, and this court not only sustained the appeal, but went further and maintained the position that the receivers represented the bondholders, the railway company and all other creditors *as against this particular creditor*, and reversed the decree of the lower court, directing it to enter one in favor of the receivers. The court says (page 618):

"The receivers stand in the place of the administrator in the Massachusetts case, *and represent not only* an insolvent debtor, but *all* of its creditors as well, whose rights attached to the fund upon their appointment, and before any appropriation of the portion thereof represented by the drafts had been effected by presentation or acceptance, and even before the fund became due and payable by agreement of the railway companies."

So it appears from these two decisions of this court (*Hook vs. Bosworth* and *Bosworth vs. Bank*) that *it is immaterial whether a receiver represents only the mortgage trustee or all creditors, secured or unsecured, and that in either event it is his right and duty* for the preservation of the estate in his hands for whomsoever may be ultimately entitled thereto *to resist the diminishing of that estate* by the payment to a general creditor in priority over all other creditors.

69 Passing now to the next case in which this court has recognized and sanctioned this receiver's right to appeal from an order of the court appointing him, which directs the distribution of the assets of the insolvent corporation, we come to *Bosworth vs. Francis Hook*. The opinion in this case was handed down in January, 1897, and not yet reported. In that case Francis Hook filed her intervening petition in the original foreclosure cause, alleging that the receivers had taken possession of one hundred gondola cars, upon which she had a lien prior to all other creditors, securing the payment of a promisory note of the railway company for $11,070 held by her. The petitioner prayed the payment of this amount out of the estate in the hands of the receiver, or in default, for the surrender of these particular cars, which were also in the hands of the receiver.

On these facts we again submit that that case also was an attempt on the part of one creditor to obtain a priority over other creditors of the estate, and that when the circuit court entered its decree di-

recting the receiver to pay the intervenor the amount in question out of the funds in his hands, within a specified time, that such was a "decree declaring the respective equities of the parties to the suit," *not the parties to the original suit*, but parties to the suit *as that term is used and applied in the opinion (p. 4) of the court in the present case.* Again in that case, the receiver felt it was his duty to take the judgment of the court of last resort, and so he prayed and perfected an appeal from the order which thus diminished the estate and directed him to part with a portion of it.

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Did this court in that case say to the receiver that he had no right to appeal from that order; that he was as much a representative of Francis Hook as of the mortgagee; that he should, as between these two parties, be indifferent and not a partisan; that his duty was to all in common, that he should not become the advocate of one against the other? No such position was there taken by the court; but, on the contrary, this court again not only sanctioned the receiver's appeal, *but upon it alone*, reversed the lower court and directed it to enter a decree dismissing the intervening petition.

The only response which we can possibly anticipate to these repeated approvals of the receiver's right to appeal is, that in none of those cases was the question directly raised by opposing counsel. This is true, but it must not be overlooked that such a question is one that goes to the very foundation of the jurisdiction of the court of appeals to hear and determine the controversy—questions of which character the courts invariably raise *sui sponte*. But it is also true that the question was not directly raised in this case, as it should have been, by motion to dismiss, before the matter was submitted on its merits.

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If this right to appeal had not been declared by other courts, we submit that its recognition by this court in all the litigation which has heretofore grown out of this particular foreclosure proceeding is full justification of the continuance of that practice by this receiver under the advice of his counsel.

(c.) Is not the demand of an unsecured creditor for priority just as much a claim asserted against the whole estate as one growing out of the negligence of receiver?

In distinguishing this case from *Thom vs. Pittard*, 8 *U. S. App.*, 597, the court in its opinion (p. 3) says:

"This right and duty should, however, be limited in its exercise to those cases in which the estate, as a whole, is interested to enforce a right or to defend a claim asserted."

That was a case in which an employee of the receiver sued him for a personal injury and recovered a judgment, from which the receiver appealed. The argument against the right to appeal in that case is identical with the argument of opposing counsel in this case. We submit that in attempting to compel the receiver to respond in damages for the injuries sustained, *the employee was not asserting a demand which was in any sense more* against the whole estate, than an intervenor who seeks to have his unsecured debt paid

out of the estate in the hands of a receiver. *Prima facie*, that estate, both the *res* and the income, belong to the mortgagee, and
72 any decree or judgment which directs the receiver to pay money out of it diminishes it to that extent, and the estate, as a whole, is just as much interested in defending against one claim as against the other.

The claimants in both instances are strangers to the original litigation and both seek to diminish, to the extent of their claims, the subject-matter of the original controversy. If it is not necessary for the parties to the original controversy to appeal from the demand of one, upon what theory should they be compelled to appeal from the demand of the other? Both are seeking to participate in the estate which the receiver has undertaken to preserve for the application of the decree which shall be entered on the determination of the issues made between the parties to the original bill, *not on any issue which may be raised by the claim of some stranger to participate in the estate.*

Point IV.

The court appointing the receiver made him the guardian of the interests of whomsoever should be ultimately entitled to the estate.

At page 4 of its opinion this court says that neither the trustee bondholders nor purchasers are in court objecting, and therefore asks who made the receiver guardian of their interests. Our
73 reply is that when the bondholders, through their trustees, filed their bill to foreclose a certain mortgage, they represented to the circuit court, that by virtue of a certain contract they were entitled to have all of the property of the railway company sold to pay their certain indebtedness. The issues raised by this claim could not be determined at once, and for the purpose of preserving that property, so that if the court found the issues for the bondholders, this property would be in its possession to sell for their benefit, and so that also if the court found the claim of the bondholders was not sustained, it could restore the property to the company. It was therefore that the court entered an order directing the receiver to take possession of this property and, *primarily*, to preserve it for whomsoever should be ultimately entitled to it, as would follow from a determination of the issues raised on the bill and answer.

(*a.*) In appealing from an order which diminishes the estate the receiver is not necessarily solely asserting the right of one creditor over another.

The theory upon which this receiver has appealed in this case, and in all of the cases arising out of this foreclosure above referred to, is that it was his duty to preserve the estate as against all strangers to the *original controversy*, and that as to the equity of any decree which was entered on an intervening petition directing
74 him to part with a portion of that estate, he should have the judgment of the court of last resort. As to any controversy

between the parties to the original bill he had no interest; *but as to a controversy between a stranger to the cause and the estate*, he had a well-defined interest, and was in duty bound to resist to the utmost the assertion of any claim which would diminish that estate. And we earnestly contend that the fact that the stranger, attempting to get possession of a portion of the estate, happens to be an unsecured creditor, and bases his demand on some equity supposed to be prior to that of the original parties, does not necessarily make the action of the receiver, in defending the estate, the assertion of the right of one creditor over another.

(*b.*) He is simply asserting the right of the estate not to be subject to the demand made against it.

When the receiver appeals from an order which subjects the estate to the satisfaction of any demand, we submit that the manifest weight of authority is conclusive that he comes to this court as the representative of no particular party, *but of the estate*, and in asking the judgment of this court he is asserting the right *not of a party*, but of the estate for the benefit of whomsoever may be ultimately entitled thereto.

This position is adopted by this court when it says of him (Opinion, p. 4) that:

"He has the right to appeal with respect to any claim asserted by or against the estate, for therein he is the representative of the entire estate."

75 If this is so, then upon what ground is this appeal dismissed? Is it upon the ground that the demand of the intervenor is not a claim against the estate?

(*c.*) The claim of appellee is one asserted solely against the estate.

Can it be seriously considered for one moment that the claim of the Terminal Railroad Association is not one which is asserted against this estate, and *asserted solely against the estate?* In the intervening petition no relief is prayed against the railway company; no relief is prayed against the bondholders, nor the trustee, nor any other creditor; *but the form and substance of the demand is against the estate solely.* The intervening petition seeks no priority over other creditors; it simply asks the court to give it a portion of the estate *and ignores all parties.* (R., p. 26.)

POINT V.

This right to appeal is announced by the two leading text-writers on receivers.

At section 264 *of High on Receivers*, a text-writer who for years has been recognized by the courts of this country as eminent authority on that subject, we find the following:

"It is held in actions against receivers in their official capacity that they cannot, either expressly or impliedly, waive any legal or

equitable defense on which their principal might have relied
76 had the action been brought against him. Receivers of an insurance company, cannot, therefore, in an action brought against them to recover upon a policy of insurance issued by the company, waive or dispense with the conditions of the policy as to notice of loss. And although leave may be granted to sue a receiver, he is at liberty to assert any defense which he may have to the action, either by plea, answer or demurrer, *and he has the same right to appeal from an adverse judgment for the recovery of funds pertaining to his receivership*, as the party over whom he was appointed would have had."

On this same subject we find that *Beach*, the other well-recognized authority on receivers, at *section 716*, says:

"Every claim presented against a fund in the hands of a receiver, if contested before the court, *becomes in effect a suit against the receiver*, which is ended by final judgment allowing or rejecting the claim, and any party to the contest dissatisfied with the result, may have the proceedings reviewed on appeal. *The receiver, as a party defendant to the action, has the same right to appeal from a judgment of the court affecting the interests of the estate represented by him*, that the party or corporation to whom the estate originally belonged would have had if the suit had been brought against them."

(a.) An appeal by a receiver may be a meritorious rather than a censurable act.

High on Receivers, at section 207, says:

"It is important to observe that the general doctrine of courts of equity, recognizing a receiver as the officer or representative of the court from which he derives his appointment, *is not to be understood as limiting or restricting his rights in the management of a suit which he has once undertaken.* And after entering upon the litigation, he is regarded as being entitled to all the freedom of action of any other person, *and the fact that he appeals from a decision which is adverse to him is not of itself evidence of bad faith, or mismanagement of his trust, and may be a meritorious rather than a censurable act.*"

77 POINT VI.

This action should be determined upon the record.

In its opinion at page 4 the court assumes that the estate has passed out of the hands of the receiver since this intervening petition was filed, as it says:

"The record here is not complete. There has been brought to this court only so much of the record as is thought to bear upon the particular question which the receiver desired to present. It was, however, conceded at the argument that prior to the decree appealed from the railway had been sold under decree of sale, and had passed out of the possession of the receiver and into the possession of the purchaser, and that the receiver had not in hand any moneys with which to pay the debt adjudged."

We are unable to say how much the conclusion of the court is

based upon the foregoing assumption of facts which do not appear of record. But it is safe to say that this court would not have inserted the same in its opinion, if it in no way affected its conclusion. We, therefore, feel justified in calling attention to the well-settled principle that a court of review in determining any question presented to it will confine itself strictly to the record before it. It is true that those matters were admitted by counsel at the argument, but this court in *Hook vs. Bosworth, supra*, said that although counsel suggested certain facts, yet nevertheless, as they did not appear
of record, it could not *assume them to be facts.*

78 Again, all of these facts assumed by this court must have occurred subsequent to the filing of the intervening petition, and this court has held in *Empire Distilling Company vs. McNulta*, 77 *Fed. Rep.*, 700, that while a petition of intervention need not be as formal as a bill of complaint, yet it should contain all the material facts relied on, and embodying by recital or reference, so much of the record in the original suit as is essential; and that proceedings taken in that original suit after the filing of the petition which would fortify the right of the intervenor, should be incorporated in the petition by amendment, *and if this is not done such proceedings cannot be noticed by an appellate court* inasmuch as those subsequent proceedings are not properly brought before it on appeal.

The justice of this is at once apparent, for when the subsequent proceedings are made a part of the record, and one party asserts its intention of relying thereon, the other party has an opportunity of meeting in a formal and orderly manner the contentions asserted by the opposing party on account of said subsequent proceedings.

The conclusion which, it is apparent, the court has based upon this premise of facts, not disclosed by the record, is found in the following language (Op., p. 5):

"By what authority may he assert the rights of a purchaser? *By what right does he undertake to prevent the enforcement of this claim against the purchased estate,* presumably by the decree of sale,

79 charged as a lien upon it? He has no such right. He is, in so doing, an interloper, obtruding himself in breach of his duty where he has no right, and in a matter in which he is not concerned, and to sanction such action is to encourage vexatious litigation at the expense of the estate which should be cast upon the interested parties, and to hold out the temptation to a receiver and his counsel to swell the cost of administration by assuming litigation with which he has not the right to interfere."

We submit that this conclusion of the court can be based upon no other premise than the assumption of facts not in this record, viz: *that the only interested party is the purchaser at the foreclosure sale.*

Point VII.

The decisions of the State courts, cited by appellee denying right of appeal, are based on facts not found in this record.

We earnestly request the court to examine the facts in the cases which appellee has cited in support of the proposition that a receiver

has not the right of appeal. We have made a brief abstract of those cases for the purpose of showing that the conclusions reached by those courts are based on a condition of affairs wholly different from that disclosed by the record in this case; and for that reason submit that the quotations from the opinions, set out in opposing counsel's brief, have no application to the case at bar.

The court will find, not only that the proceedings, in which
80 those receivers were appointed, were for the dissolution of corporations and the winding up of the affairs of individuals, partnerships and lunatics, but that the receivers were appointed for the express purpose of conserving the estate for the benefit of *all* creditors, secured and unsecured, and for the distribution of such estate between them, *pro rata*.

The court will also find that in two of the citations the receiver's appeal was dismissed on the ground that *he was attempting to offset a claim of his own against the trust estate*, and that the quotation from *Thompson on Corporations*, in which he so positively asserts that receivers have no right of appeal in matters concerning the distribution of the estate, *is based solely on those two cases*.

In *Herrick vs. Miller*, 123 *Ind.*, 305, it appears that Herrick was appointed receiver after a decree of sale had been entered in a suit to foreclose a real-estate mortgage. He was appointed for the express purpose of receiving the rents and profits pending the sale and during the year of redemption. The receiver reported to the court that up to the date of sale the rents collected amounted to $17.23, claiming credits for $12.40. The court refused to approve this report and the receiver then filed another showing in addition, rents collected during the year for redemption to be $92.12. Miller, the complainant in the foreclosure, filed a motion for an order on the receiver to pay the amount over to him. The receiver
81 resisted this motion on the ground that he had bought the property after the foreclosure, and was therefore entitled to the profits earned by the land during the year for redemption. The court sustained the motion of Miller and required the receiver to pay over the money. From this the receiver appealed. The real ground upon which that appeal was dismissed is found in the following language of the court:

"When ordered to pay the money to any particular person he will not be allowed to offset a claim due to him personally, since to allow this would render the disposition of the money as uncertain as before the receiver's appointment, and would defeat the very object of his appointment."

In that case there was no question as to the priority of rival creditors, of an insolvent to the estate; the real question was whether a receiver could become a purchaser of property pertaining to his trust, and could offset his claim in that behalf against complainant. Everything said by the court not necessary to that determination is *obiter dicta*.

Stanton vs. Andrews, 18 *Ill. App.*, 552, originated in an intervention filed by Andrews in a creditors' suit. It appeared that all the funds that could be realized from the insolvent judgment debtor

had been distributed in pursuance of a stipulation entered into by all the parties interested.

The claim of Andrews was for royalties accruing on work finished by the receiver. The receiver joined issue and on hearing
82 the master found in favor of the petitioner, but his report was overruled by the court, on the sole ground that petitioner should have sued at law instead of intervening in the creditors' suit. From this decree the intervenor appealed and in reversing the lower court, the supreme court not only sustained the remedy pursued, but also affirmed the claim.

It was then, after the petitioner's right to the amount claimed had been sustained by the higher court, and by agreement of all creditors and parties in interest, a sum had been set apart for satisfying the claim, that the receiver refused to pay it.

The only ground upon which the receiver based his right to contest the allowance was, an order which the lower court entered while the case was pending on the first appeal, setting aside a certain sum to satisfy petitioner's claim, and *providing that the receiver should retain the residue, if any, as additional compensation for his services.*

The court says:

"It is apparent to us that this action on his part is dictated by that provision of the order of January 4th, 1886, which constructively *gave the receiver a contingent interest* in the sixteen hundred dollars set apart for appellee's claim. We cannot but regard that part of the order as injudicious. It placed the receiver in a position where *his interest was in direct conflict with his duty.*"

So it will be seen that the controlling question in this case
83 was the same as that in *Herrick vs. Miller, supra*, viz., that the receiver could not assert a personal claim to the trust property. And in addition we find that the court had marshalled the assets of the insolvent.

Section 6941 *of Thompson on Corp.* is based *solely* on the two foregoing cases, and is therefore entitled to no more weight, nor to be decisive of any other principle, than they are.

In 3 *Md. Ch.* (*Re Colvin*) 278, a chancery court appointed a committee for a lunatic. Shortly afterwards the lunatic died and the court appointed a receiver to take charge of her property pending a litigation over her will. Later on the orphans' court appointed an administrator, and the question was, who was entitled to the possession of the property. There was no question of the receiver appealing from any order, distributing the assets in his hands, between rival claimants.

In *Chicago Title and Trust Company vs. Caldwell*, 58 *Ills. App.*, 219, the express object of the original bill was to dissolve an insolvent corporation and distribute its assets *pro rata* among its creditors. The lower court ordered the claim of Caldwell to be allowed against the estate for $850.

"To be paid *pro rata* with the claims of general creditors, and that the receiver pay to said Caldwell as dividends upon said sum

the same percentage thereof as paid upon other claims of unsecured creditors."

84 The case of *Strauss vs. Carolina Interstate B. & L. Association* we do not find reported at 24 *S. E. Rep.*, 740, as cited by appellee, and therefore cannot state with accuracy the nature of the proceeding.

Beverly vs. Brooke, 4 *Gratt.*, 208, also appears to be a controversy in which the court was administering the property for the benefit of *all creditors*, and involved no question of a receiver's right to appeal from an order distributing the assets between rival creditors.

In *People vs. Security Life Insurance Company*, 79 *N. Y.*, 267, it appeared that the receiver obtained an order requiring all creditors of the insolvent corporation to exhibit their claims within a specified time. Before the expiration of the time, he addressed a circular to the policy-holders to the effect that policies in force on the books of the company would be allowed without subjecting their holders to further proof; mislead by such circulars the holders did not make further proof of their claim. These were objected to by other creditors, and were accordingly rejected by the referee, to whom the cause was referred to take proof *as to distribution of the assets.* But before any dividend had been made the receiver applied for and obtained an order giving two months' further time within which such claims could be presented and established before the referee.

85 On this state of facts the court says:

"The learned counsel for the appellants contends that the receiver has no standing in court; that he can be heard only as to his fees and compensation, and had no right to be heard upon the motion which resulted in the order appealed from; and, second, that the court itself had no power to grant the order. *Upon both questions we think he is in error.* Since the receiver is an officer, or as he is sometimes called, 'the hand' of the court, *it would be singular if he could not at any time go to it* with his complaint, *or for instructions in regard to any matter touching the fund placed in his custody, and more especially when*, as in the case before us, *it is in danger*, through his own error, *of being unfairly distributed.* He is not to advocate the cause of one claimant as against another—between them is indifferent, owing a like duty to all, *and for that very reason* should, as far as possible, see to it that each has an equal opportunity to enforce his claim. *He stands as their representative and is bound to give them reasonable aid.*"

It is not to be forgotten that the above case was cited by appellee to support its contention that a receiver has no right of appeal, and we submit that it sustains the contrary.

Dorsey vs. Seibert, 93 *Ala.*, 312, comes nearer presenting a state of facts similar to the case at bar; but there is this vital distinction; first, it was a suit by a *general creditor* against the railway company, and therefore the funds arising from its operation *belonged* to general creditors who might intervene; second, the particular creditors did not intervene until after the property was sold, title made, and proceeds placed in the hands of the receiver for distribution.

86 Upon reference to the record (p. 31) it will be seen that the solicitors for the receiver in this foreclosure have also represented the complainant trustees.

We are aware that the better practice forbids this and requires that the receiver and the trustees, at whose suit he is appointed, should have separate counsel. In some circuits, especially in cases of great importance, the courts either appoint separate counsel for the receiver, or require the latter to do so.

Some trustees, the Central trust of New York, for instance, as a rule will not permit its local counsel to represent the receiver. In this case there were three mortgages foreclosed. The first mortgage by the Mercantile trust; the second by the Central trust, and the third by the Metropolitan trust—all consolidated by consent into one cause, in friendly co-operation for amicable foreclosure and reorganization. Both for unity of action and for economy, the undersigned solicitors, upon like consent of all concerned, have acted as local counsel for all the trustees and for the receiver.

Having reference to these facts and to the practice in this circuit, as illustrated by the *McLeod* and other cases and others herein discussed, we respectfully but urgently submit that if an example touching appeal in the name of receivers was needed to correct an objectionable practice, the object of the court has been fully
87 accomplished, and that the ends of justice do not require that the court should deny to clients a decision upon the merits involving possible severe pecuniary loss in order to give emphasis to the rule which the court desires to establish.

The opinion of the court has also been made the occasion in the public press for harsh and injurious personal criticisms against the receiver, and while we are aware and make haste to acknowledge, that the court is in no sense responsible for such result, yet that does not heal the smart to a just pride, or the injury to well-earned reputation. It is conceded he has been zealous, efficient and highly successful in the administration of his trust, has had the confidence of the court and the bondholders, and should be permitted to end his trust, now nearing its close, with praise rather than blame.

Under all the circumstances, if a rehearing were now granted, the object of the court would have been fully accomplished, and an opportunity would be given for a consideration and decision of the appeal upon the merits and upon the record.

It is hardly necessary to say to the court that nothing was further from the mind of counsel than to trouble it with mere moot questions. *Thom vs. Pittard*, in the light of *Farlow vs. Kelly*, to say nothing of the support found upon full review herein of text-writers and adjudicated cases, seem ample justification for the appeal
88 itself in the name of the receiver, and if a receiver's rights in the management of a suit are to be restricted by his being construed as the "hand" and the court which appoints him as the "head," it follows that "if the order granting the appeal should be treated as permission to appeal," then there is no rebellion of the hand against head.

While upon the merits, we rely with the utmost confidence for

success, upon the decision of the Supreme Court of the United States in the leading case cited upon our brief—*St. Louis, Alton & Terre Haute Railroad vs. C., C., C. & I. Railway*, 125 *U. S.*, 658, where that court unqualifiedly takes the ground that it is absolutely necessary to *aver and prove* a diversion before a mortgage lien can be postponed, we are all the more solicitous for a rehearing in view of the fact that there is already upon the docket of this court a second appeal, to be heard at the October term—No. 417—by the same receiver against different parties presenting similar questions but perfected before this opinion was rendered, the two appeals together involving above thirteen thousand dollars.

If a rehearing is granted, both can be fully heard at the October term, and the present opinion adhered to, or modified as equity may demand.

89 *Conclusion.*

In conclusion we, therefore, submit that the weight of authority sustains our contention that in cases in which the courts have taken possession of railroad property upon the application of a mortgagee seeking to foreclose its mortgage, the receiver represents no party but the estate itself, and that it is his duty to resist every attempt on the part of a stranger to diminish the same by depriving him of any portion of it, and that to retain the fullest possession he has the right to represent to the court of last resort for review any decree made by the lower court.

Again, that the repeated recognitions, and sanctions, by this court of this particular receiver's right to appeal, in this particular foreclosure proceeding, justifies his appeal in this particular case; and that if it is the desire of a court to discountenance these appeals it should remand this cause to the trial court, with directions to permit either the complainant in the original cause, or any party who has succeeded to its rights, to be made a party to this intervening petition, and with the right to appeal from a decree of the court to be made thereon.

90 *Prayer.*

For the reasons above stated the complainant respectfully petitions this court for a rehearing in this matter, and that the decision of this court, and any order to be entered thereon dismissing this appeal, may be set aside.

C. H. BOSWORTH, *Petitioner.*

BLUFORD WILSON,
PHILIP BARTON WARREN,
Solicitors for Petitioner.

91 And afterwards, to wit, on the twelfth day of July, 1897, in the term and year last aforesaid, came the appellee, by its counsel, and filed in the clerk's office of said court its reply to appellant's petition for a rehearing; which said reply was in the words and figures following, to wit:

92 In the United States Circuit Court of Appeals, in the Seventh Circuit, October Term, 1896.

C. H. BOSWORTH, Receiver Chicago, Peoria and St. Louis Railway Company, Appellant,
vs.
TERMINAL RAILROAD ASSOCIATION OF ST LOUIS, Intervening Petitioner, Appellee.
No. 367.

Appellee's Reply to Appellant's Petition for Rehearing.

M. F. Watts and Samuel P. Wheeler, attorneys for appelle-.

Filed Jul- 12, 1897.

OLIVER T. MORTON, *Clerk.*

93 In the United States Circuit Court of Appeals in the Seventh Circuit, October Term, 1896.

C. H. BOSWORTH, Receiver Chicago, Peoria and St. Louis Railway Company, Appellant,
vs.
TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, Intervening Petitioner, Appellee.
No. 367.

Appellee's Reply to Appellant's Petition for Rehearing.

In his petition for rehearing, appellant contends that this court "misapprehended a most material fact," namely, that the admission that appellee's claim is a just claim, was an admission that
94 it is a just claim against the estate in the hands of the receiver. We confess our inability to comprehend the distinction the receiver seeks to make. He certainly does not take the position that under no circumstances can appellee's claim be considered a claim against the estate; he cannot contend that if there were assets of the estate more than sufficient to satisfy the demands of the bondholders, appellee's claim should not be paid out of such excess. He seems unable to understand that when the court took possession of the property of the insolvent railway company, it was for the purpose of doing that which the railway company could not or would not do, namely, paying the creditors of the railway company unsecured as well as secured, in the order in which equity might determine the priorities. Nor does he now seem able to comprehend the fact that the question of *preference or priority as between creditors is one which concerns the creditors only.* He has apparently forgotten the statement contained in his original brief,—"The only controversy is, as to whether or not the appellee is entitled on its petition and proof made thereunder, to have the vested lien of the mortgagee displaced to the extent of its claim." In reply to this, appellee claimed that this issue was one with which the receiver was in no way concerned, and that hence he had no appealable interest in the controversy; and this court so held. The admission that ap-

pellee's claim was just, and came within the purview of the court's order giving priority to material and labor claims accruing within six months prior to the appointment of the receiver, conceded only what the record clearly established. We beg to suggest that the receiver's petition for rehearing may be satisfactorily answered in a single
95 sentence. In his petition for rehearing (p. 3), he says: "We would find no difficulty in agreeing with the conclusion of the court that the receiver had no interest in the appeal, if we conceded the debt to be a just claim against the estate, for then clearly it would be a matter of indifference to him how it was satisfied." The simple and manifest answer to this is that the debt of the insolvent railway company to appellee, for material furnished and labor performed, within the period fixed by the court giving priority to such claims when properly presented and allowed, and conceded to be just, became a claim against the *estate of the insolvent railway company in the receiver's hands.* This is an elementary principle of law, and when the receiver is able to comprehend it he will understand why this court in dismissing his appeal held that in taking such appeal he was "an interloper obtruding himself, in breach of his duty, where he had no right." It matters not at whose instance, or what may be the nature or character of the legal procedure, whenever the estate of an insolvent comes in *custodia legis*, the party appointed by the court of chancery to take possession for that court, holds "for the benefit of whomsoever in the end it shall be found to concern, and in the meantime the court proceeds to determine the rights of the parties upon the same principle it would if no change of possession had taken place." The words quoted are from *Fosdick vs. Schall*, 99 U. S., 235, and are quoted by the receiver in his petition for rehearing (p. 5). It is, however, apparent that in construing this citation the receiver has inadvertently substituted the word "receiver" for the word "court;" for he seeks to make it *his* duty to deter-
96 mine the rights of the parties, and having done this to direct the court to make the distribution in accordance with *his* findings.

The receiver apparently finds some difficulty in understanding the fact that the payment of a just debt allowed agaist the estate is not a diminution of the estate. The moment appellee's claim was allowed and conceded to be just, the appellee became, so far as the receiver is concerned, an absolute creditor of the estate, as much a creditor as the bondholder; and the payment of appellee's claim would be no more a diminution of the estate than would be the payment of the bondholder's claim—the question of priority between the two concerns; these two alone. The difference between the *diminution of the estate*—loss by fire, accident, theft, or taking of part of the assets by some one not a just creditor—and the *distribution of the assets of the estate*, the receiver fails wholly to grasp. From his standpoint every payment he makes out of the assets of the estate—the payment of his own salary, the payment of the fees of his counsel, the payment for supplies used by him in the operation of the property—is a diminution of the assets of the estate, and should be strenuously opposed, and he would be doing only his duty

in "carrying that resistance to the court of last resort."—(Petition for rehearing, p. 7.)

On page 8 of his petition for rehearing the receiver says: "In this case the receiver admits that there is no defense to the claim as against the railway company, but that *as against the estate* he deems it to be unjust, and that there is a good and valid defense to
97 it. In interposing that defense and carrying it to the court of last resort is he not performing the very duty which this court assigns to him?" No better reply to the query can be found than the vigorous answer of this court on page 5 of its opinion. What "good and valid defense" has he suggested in the 35 pages of his original brief and argument; in the 31 pages of his reply brief, or in the 39 pages of the petition for rehearing? Through the entire 105 pages of the dirge runs the one refrain,—"the payment of appellee's claim displaces the vested lien of the mortgagee!" This, and this alone, constitutes his good and valid defense! And yet, he resents the charge that he has "become the partisan advocate, when his duty demands of him impartiality and indifference with respect to the division of this common fund." (Op., 5.) It is difficult to conceive in what way he could make himself more distinctly, confessedly and avowedly the unsolicited champion of the interests of the uncomplaiming mortgagee or purchaser under the foreclosure proceedings, nor how he could show a greater disregard of his duty to remain impartial as between the creditors contesting the right of priority.

The receiver is distressed because in the opinion delivered by this court in this cause the court refers to the concession made at the argument by receiver's counsel to the effect that prior to the decree appealed from the railway had been sold under a decree of sale. The receiver is troubled lest in some manner this concession may have affected the decision of the court. So far as the principle of law laid down by the court in its opinion is concerned, such concession plays no part. The principle, namely, that as between
98 claimants—whose claims are admitted to be just—the receiver cannot become the guardian of the interests of one claimant as against the interests of the other, and that he must remain neutral, holds good without regard to who the parties in interest may be.

Great stress is placed on the case of *McLeod vs. City of New Albany*, 66 Fed. Rep., 378. This case was cited at length by the receiver in his reply brief, read from at the argument, and the petition for rehearing (pp. 10 and 11) contains the same quotation from this case found in the reply brief (p. 20). Doubtless that case was fully considered by this court when the opinion herein was prepared, but was not referred to or commented upon because it does not in any manner or to any extent support the receiver's contention. On the contrary, the decision in that case is in entire harmony with the decision rendered by this court in this cause, and is within the unbroken line of decisions defining the receiver's duty. In the quotation given by the receiver from the *McLeod* case, occurs this passage: "It was their duty to preserve the estate and to pay the taxes thereon. *If the taxes*

were illegally laid, it was their duty, representing all the interests, to contest the payment." In that case, as in this, it was the duty of the receiver to see that the claim was *just*. The justness of the claim being conceded, the receiver's duty ended so far as resistance of payment of the claim was concerned. And so in every case cited by the receiver in support of his right to take the appeal, such right has been conceded only where the determination of the question involved might work a diminution or increase of the estate as a whole. The same is true of the citations from the text-writers,
99 High and Beach. For instance, in the citation from High, that author says, the receiver "has the same right to appeal from an adverse judgment for the recovery of funds pertaining to his receivership *as the party over whom he was appointed would have*." And in the citation from Beach, it is said, "The receiver, as a party defendant to the action, has the same right to appeal from a judgment of the court affecting the interes s of the estate represented by him that the *party or corporation to whom the estate originally belonged would have had* if the suit had been brought against them." In other words, these text-writers hold this and only this, that the receiver can make for the party, whose property has been placed in his hands the same defense the party himself could make. This principle has never been questioned, but it being admitted in this case that the railway company could make no defense to appellee's claim, it follows of necessity the receiver can make no defense. The failure on the part of the receiver to comprehend the difference between *diminution of the estate* and *distribution of the assets of the estate* is well illustrated by the closing sentence on page 17 of the petition for rehearing, where he says it is the duty of the receiver "to resist the diminishing of the estate by the payment to a general creditor in priority over all other creditors." We beg to ask how the creation of a preference or priority as between creditors can work a diminishing of the estate? And what possible interest has the receiver in the creation of such preference or priority?

The suggestion that the question of the receiver's right to appeal should have been raised on motion to dismiss, and hence
100 could not be made in appellee's brief or at the argument when the case was submitted on its merits, is answered by the receiver's admission that such a question can be raised by the court of its own motion. If the court will, of its own motion, dismiss because of the want of appealable interest, the exercise of this power is certainly not abridged because the appellee suggests to the court such want of appealable interest.

We cannot pass over in silence the concluding pages of the petition for rehearing. This court will understand, without any suggestion from us, that the opinion rendered by it in this case announces no new or startling doctrine, though it does define more clearly and concisely than any Federal court has heretofore done, the relation of the receiver to creditors, and it justly rebukes the conduct of the receiver in making himself the partisan champion of the interests of one creditor as against another. In taking the appeal in this case it is the receiver who has attempted an innova-

tion in practice, which this court saw fit to rebuke, and in terms which need no defense from us, or modification, may we beg to say, on the part of the court.

The receiver sees proper, on page 35 of his petition for rehearing, to call the attention of the court to the fact that "the solicitors for the receiver in this foreclosure have also represented complainant's trustees." In this connection we deem it proper to call the attention of the court to the second paragraph on page 38 of the petition for rehearing, in which the receiver makes the remarkable request that this cause be remanded to the trial court, "with directions to permit either the complainant in the original cause, or any party
101 who has succeeded to its rights, to be made a party to the intervening petition, and with a right of appeal from a decree of the court thereon." We marvel at the temerity of this request. It is an open and bold declaration that the receiver still represents the complainant in the original cause or its successor in interest; that he still has no regard for the obligations and duties of his position as clearly defined in the opinion of this court in this cause; and that in spite of the injunction of this court he will insist upon "obtruding himself, in breach of his duty, where he has no right, and in a matter in which he is not concerned." If he felt that the decision of the court was erroneous and rendered without proper and full consideration, it was his right to ask for a rehearing; but when this court in dismissing his appeal tells him that as between appellee and the original complainant or its successor in interest he has no right to interfere, that he is an interloper, his request to this court, now made in his petition for rehearing, that the original complainant, or its successor in interest, be allowed to take an appeal, falls little short of contempt of court.

Appellee's claim matured four years ago, and on every principle of equity its payment should not longer be delayed, especially when payment has never been resisted by any party in interest. We respectfully ask that the receiver be permitted no longer to thwart the ends of justice, and that his petition for a rehearing be promptly denied.

M. F. WATTS AND
SAMUEL P. WHEELER,
Attorneys for Appelle-.

102 October Term, A. D. 1897.

At a regular term of the United States circuit court of appeals for the seventh circuit, begun and held at the United States court-rooms, in the city of Chicago, in said seventh circuit, on the fifth day of October, 1897, of the October term, in the year of our Lord one thousand eight hundred and ninety-seven, and of our Independence the one hundred and twenty-second.

And afterwards, to wit, on the sixth day of October, 1897, in the October term last aforesaid, in the record and proceedings thereof in said entitled cause appears the following, to wit:

Before Hon. William A. Woods, circuit judge; Hon. James G. Jenkins, circuit judge; Hon. John W. Showalter, circuit judge.

C. H. BOSWORTH, Receiver, etc.,
vs.
TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, Intervenor. } 367.

Appeal from the circuit court of the United States for the southern district of Illinois.

It is ordered by the court that the petition for rehearing in this cause be, and the same is hereby, denied.

103 United States Circuit Court of Appeals for the Seventh Circuit.

I, Oliver T. Morton, clerk of the United States circuit court of appeals for the seventh circuit, do hereby certify that the foregoing printed and typewritten pages, numbered from one to one hundred two, inclusive, contain a true copy of the transcript of the record and proceedings in the United States circuit court of appeals for the 7th circuit in the case of C. H. Bosworth, receiver of the Chicago, Peoria and St. Louis Railway Company, *vs.* Terminal Railroad Association of St. Louis, No. 367, October term, 1896, as the same remains upon the files and records of said United States circuit court of appeals for the seventh circuit.

Seal United States Circuit Court of Appeals, Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals for the seventh circuit, at the city of Chicago, this 18th day of November, A. D. 1897.

OLIVER T. MORTON,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

104 In the United States Circuit Court of Appeals for the Seventh Circuit, October Term, 1896.

C. H. BOSWORTH, Receiver,
vs.
TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, Intervening Petitioner. } No. 367.

It is stipulated by and between the parties hereto, by their respective counsel, that the certified copy of the transcript of record in this cause, filed by the clerk of this court in the Supreme Court of the United States in the application there made for a writ of certiorari, in the cause there entitled "C. H. Bosworth, receiver, *vs.* The Terminal Railroad Association of St. Louis, No. 535, October term, 1897," shall be taken as a return to the writ of certiorari

granted by said Supreme Court in said cause on the 19th day of January, 1898.

SAMUEL P. WHEELER,
Solicitor for Terminal R. R. Ass'n of St. Louis.
BLUFORD WILSON,
PHILIP BARTON WARREN,
Solicitors for C. H. Bosworth, Receiver.

105 United States Circuit Court of Appeals for the Seventh Circuit.

I, Oliver T. Morton, clerk of the United States circuit court of appeals for the seventh circuit, do hereby certify that the foregoing typewritten page *inclusive* contain- a true copy of the stipulation filed July 26th, 1898, in the case of C. H. Bosworth, receiver *vs.* The Terminal Railroad Association of St. Louis, No. 367, October term, 1896, as the same remains upon the files and records of said United States circuit court of appeals for the seventh circuit.

Seal United States Circuit Court of Appeals, Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals for the seventh circuit, at the city of Chicago, this 26th day of July, A. D. 1898.

OLIVER T. MORTON,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

106 UNITED STATES OF AMERICA, *ss:*

Seal of the Supreme Court of the United States.

The President of the United States of America to the honorable the judges of the United States circuit court of appeals for the seventh circuit, Greeting:

Being informed that there is now pending before you a suit in which C. H. Bosworth, receiver of the Chicago, Peoria & St. Louis Railway Company is appellant and The Terminal Railroad Association of St. Louis is appellee, which suit was removed into the said circuit court of appeals by virtue of an appeal from the circuit court of the United States for the southern district of Illinois, and we being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said circuit court of appeals and removed into the Supreme Court of the United
107 States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 19th day of January, in the year of our Lord one thousand eight hundred and ninety-eight.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

108 UNITED STATES OF AMERICA, }
Seventh Circuit. }

In obedience to the command of the foregoing writ of certiorari and in pursuance of the stipulation of the parties, a full and true copy of which is hereto attached, I do hereby certify and return that the transcript of the record filed with the application to the Supreme Court of the United States for a writ of certiorari in the case of C. H. Bosworth, receiver of the Chicago, Peoria and St. Louis Railway Company, appellant, *vs.* The Terminal Railroad Association of St. Louis, appellee, is a full, true, and complete transcript of the record upon which said cause was heard in the United States circuit court of appeals for the seventh circuit, together with all proceedings in said court.

Seal United States Circuit Court of Appeals, Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States circuit court of appeals for the seventh circuit, at the city of Chicago, this 26th day of July, A. D. 1898.

OLIVER T. MORTON,
Clerk United States Circuit Court of Appeals for the Seventh Circuit.

[Endorsed:] 16,748. Supreme Court of the United States. No. 211, October term, 1898. C. H. Bosworth, receiver, &c., *vs.* Terminal Railroad Association of St. Louis. Writ of certiorari and return. Office Supreme Court U. S. Filed Aug. 19, 1898. James H. McKenney, clerk.

Endorsed on cover: Case No. 16,748. U. S. C. C. of appeals, 7th circuit. Term No., 211. C. H. Bosworth, receiver of the Chicago, Peoria and St. Louis railway, petitioner, *vs.* Terminal Railroad Association of St. Louis, intervening petitioner. Filed December 13, 1897.